Selection of Leading Cases.

FOR THE USE OF B. L. STUDENTS.

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PART I.

HINDU LAW.

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SELECTION OF LEADING CASES.

I.

HINDU LAW.

HUNOOMAN PERSAUD PANDAY

v.

MUSSUMAT BABOOEE MUNRAJ KOONWEREE.

(Reported, in 6 Moo. I. A. 393; s. c. 18 W. R., 81.)

THE RIGHT HON. THE LORD JUSTICE KNIGHT BRUCE:

23th July, 1856.

The complainant in the original suit, was *Lál Inderdown Singh*, described in the plaint as proprietor of the *Raj* of Pergunnah *Munsoor Nuggur Bustee*. The suit was against the present appellant, the chief defendant, and *Rance Degumber Koonweree*, the second Defendant, the mother of the complainant. The complainant sought by his plaint the possession of certain immovable property described in his claim, the particulars of which it is unnecessary to state. He sought also to set aside a mortgage bond bearing date *Assar, soodee Poornumashee*, 1246 *Fusle*e, set up by the appellant; to oust the appellant, to cancel the name of the appellant as mortgagee in the Collector's records, and to recover mesne profits.

To this suit the Defendant put in his answer. The title of the complainant to the lands as heir was not denied by the answer; but the defendant alleged his title as mortgagee (except as to some *Birt* lands, the claim to which was abandoned in the suit, and to which it is unnecessary further to refer). The substantial dispute between the parties was, as to the lands for which the suit proceeded, whether the defendant could resist, under his title as mortgagee to the extent of that interest, the title of the complainant as heir and proprietor of the lands.

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It is unnecessary to enter in detail into the pleadings or proceedings in the suit. It is sufficient to state, that in the result, the *Sudder Ameen* decided in favour of the security, and dismissed the claim generally, but that on appeal from that decision, the *Sudder* Court decided against the security, and in substance granted the relief asked by the plaint, except in so far as it was abandoned.

The reasons for the decision of the appellate Court are contained in their judgment. The Court says, "The question with which the Court have first to deal, respects the right of the *Ranee* to execute the instrument before them." They then remark, "that the Bond itself assigns to the *Ranee* a proprietary character, and that it was not amongst the defendant's pleas that the *Ranee* acted as her son's guardian, but that he has claimed for her the proprietary character, both in his answer to the plaint, and still more broadly and unreservedly in his answer to the pleadings in appeal. The plaintiff, on the other hand, has throughout argued for the avoidance of the Bond, by denying the *Ranee's* proprietary title in any way; and such being the issue joined between the parties, the Court, looking to the fact that the estates in dispute unquestionably devolved on the plaintiff to the exclusion of the *Ranee*, on the death of the plaintiff's father, *Raja Sheobuksh Singh*, have no hesitation in declaring that, even on the assumption that the *Ranee* voluntarily executed the Bond, and received full consideration for it, the Bond is not binding on the plaintiff, and that neither he nor his ancestral property can be made liable in satisfaction of it. It is needless for the Court, their inquiries being thus stopped *in limine*, to enter on the real merits of the transaction as between the *Ranee* and Hunooman Persad Panday."

Their Lordships collect from this judgment that the Court thought that a bar was interposed by the pleadings, and by the *Ranee's* act of assumption of proprietorship, to the further consideration whether the appellant's charge could in any character be sustained against the estate.

The Court did not enter upon the question of the validity of the charge, in whole or in part, as a charge effected by a *de facto* Manager, or proprietor, whether by right or by wrongful

title, nor advert to the fact that the charge included some items of former charge wholly unaffected by the objection which they considered of so much weight.

This judgment may be considered under the following points of view :

First. Did the appellate jurisdiction rightly construe the pleadings, and take a right view of the issues framed under the direction of the Judge, according to the practice of those Courts ?

Secondly. Did it take a right view of the relation in which the *Ranee* intended to stand to her son's estate ? And,

Thirdly. Did it consider the point, whether the rights of these parties could wholly depend upon the question whether that relation was duly or unduly constituted ?

On the first point their Lordships think it right to observe, that it is of the utmost importance to the right administration of justice in these Courts, that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience ; that the substance and merits of the case are to be kept constantly in view ; that the substance and not the mere literal wording of the issues is to be regarded ; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and if need be, by adjournment, for the decision of the real points in dispute.

But their Lordships think that if the wording of the issues be carefully considered, it will be found that the issue in substance is, whether the charge under the instrument bound the lands. The words in which the Principal *Sudder Ameen* states the issue on this point are "whether it (the mortgage Bond) ought to have effect against the mortgaged villages." It was not an issue limited to the particular description or character in which this act was done, and a misdescription or error in that respect would not have been fatal to the charge. Consequently, their Lordships cannot agree with the *Sudder Dewanny Adawlut*, upon the first point, that the real question in dispute between these parties, namely, whether the charge bound the lands in the hands of the heir, was not

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substantially included in the issues, which were evidently intended to raise it. Neither can their Lordships adopt the reasoning or the conclusion of the *Sudder Dewanny Adawlut*, upon the second point, as to the relation in which the *Ranee* meant to stand, and substantially stood, to the estate of her son.

Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. Now, what is meant by the assumption of proprietorship on the part of the *Ranee*, which the judgment ascribes to her? It is not suggested that she ever claimed any beneficial interest in the estate as proprietor; had she done so, it would have been, *pro tanto*, a claim adverse to her son; and it is conceded by the respondent's counsel that she did not claim adversely to her son. The terms of "proprietor" and of "heir," when they occur, whether in deeds or pleadings, or documentary proofs, may, indeed, by a mere adherence to the letter, be construed to raise the conclusion of an assumption of ownership, in the sense of beneficial enjoyment derogatory to the rights of the heir; but they ought not to be so construed unless they were so intended, and in this case their Lordships are satisfied that they were not so intended. They consider that the acts of the *Ranee* cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her; that she must be viewed as a Manager, inaccurately and erroneously described as "proprietor" or "heir"; and it is to be observed, that the Collector takes this view, for, whilst he remarks on the improper description of her as heir, or proprietor, he continues her name as "*Surberakar*." If the whole context of all these documents and pleadings be taken into consideration, and the construction proceeds on every part, and not on portions of them, they are sufficient, in their Lordships' judgment to show the real character of her proprietorship.

Upon the third point, it is to be observed that under the Hindu Law, the right of a *bonâ fide* incumbrancer who has taken from a *de facto* Manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support

the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto*, with the *de jure* title. Therefore, had the *Ranee* intruded into the estate wrongfully, and even practised a deception upon the Court of Wards, or the Collector, exercising the powers of a Court of Wards, by putting forth a case of joint proprietorship in order to defeat the claim of a Court of Wards to the wardship, which is the case that Mr. Wigram supposed, it would not follow that those acts, however wrong, would defeat the claim of the incumbrancer. The objection, then, to the *Ranee's* assumption of proprietorship, in order to get the management into her hands, does not really go to the root of the matter, nor necessarily invalidate the charge; consequently, even had the view which the *Sudder Dewanny Adawlut* took of the character of the *Ranee's* act, as not having been done by her as guardian, been correct, their decision against the charge without further inquiry would not have been well-founded. It would not have been accordant with the principles of the Hindu Law, as declared in Coleb. Dig. vol. i, p. 302, and in the case of *Gopee Churan Burral* v. *Mussammaut Ishuree Lukhee Dibia*, (1) and as illustrated by the case cited for the appellant in the argument, against the authority of which no opposing decision was cited. Their Lordships, however, must not be understood to say, that they see any ground of probability for the assertion, that the *Ranee* really meant to deceive the Court of Wards, or the Collector exercising its authority, by any consciously false description of herself. The title to this *Raj* cannot readily be supposed to have been unknown in the Collector's office, nor is it probable that the *Ranee* could have deceived the office by such a false description of herself.

It is a circumstance worthy of remark, too, that the complainant does not ascribe this conduct to her in his plaint. The case that the plaint makes is not that she intruded upon him and assumed proprietorship; the plaint itself says she had possession as guardian, that is, as managing in that character; and on a review of the whole pleadings and documentary evidence, and of the probabilities of the case, their Lordships think it a strained and untrue construction to assign

(1) 3 Sud. Dew. Adaw. Rep., 93.

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any other character to her acts than that which the plaint ascribes to them, notwithstanding the use of terms inconsistent with it. For these reasons, their Lordships think that the judgment of the *Sudder Dewanny* Court cannot be supported on the grounds which that Court has assigned.

It then remains to be considered whether the judgment is substantially right, though the reasons assigned for it are not satisfactory or sufficient.

If the evidence discloses, as it is contended for the respondent that it does disclose, no *primâ facie* case of charge at all on this ancestral estate, then, as the only bar to the resumption by the heir of his estate is the alleged mortgage title over it, the proof of which lies on the mortgagee, the complainant's title to the estate, to the mesne profits, and to the other relief, is made out ; but if, on the other hand, the evidence discloses even a *primâ facie* case of charge, some inquiry at least ought, as it seems to their Lordships, to have been directed.

The question then next to be considered is, whether a *primâ facie* case of a subsisting charge is made out by the appellant. This question involves the consideration of two points : first, the actual *factum* of the deed ; and, next, the consideration for it.

First, as to the *factum*. The execution of the Bond by the *Rance* is stated by several of the attesting witnesses. It was argued, however, on behalf of the respondent, that the Court ought not to act on their evidence. Some discrepancies,—such, however, as are not unfrequently found in honest cases in native testimony,—were dwelt upon. The *Sudder Ameen*, who decided this case originally, has made some pertinent remarks on the confirmation which circumstances give to the oral evidence that the Bond is the deed of the *Ranee*. The decision by a native Judge, possessing the intelligence which this judgment of the *Sudder Ameen* evinces, on a question of fact in issue before him, is, in the opinion of their Lordships, entitled to respect ; he must necessarily possess superior knowledge of the habits and course of dealing of natives, and that knowledge would be likely to lead him to a right conclusion upon a question of disputed fact. The *Sudder Ameen*, obser-

ves, in substance, that possession went along with this Bond, and that the mortgagee was inscribed in that character as proprietor on the records of the Collector. He was, therefore, put in possession as mortgagee, and was publicly known as mortgagee in the Collector's office.

It is to be observed further, that his receipt of the rents and profits of the lands included in this conveyance would diminish, *pro tanto* the annual income of the estate, which would come to be administered by the *Ranee*, and that this state of things continued for several years after the execution of the Bond. The *Ranee's* ignorance, then, of such title, possession, receipt, and diminution, is as the *Sudder Ameen* justly observes, not a probable supposition. It could be rationally accounted for only on one supposition—that the *Ranee* was a mere cypher, and entirely ignorant of that which was done in her name. This, however, does not appear to have been the case : she herself denied it on a subsequent contest as to the managership ; and the act of the Collector in his decision upon that dispute, in putting her into the management, confirms her own statement of her capacity. Had her incompetency been of so flagrant a character, as the above hypothesis demands to be attributed to her, it is not reasonable to suppose that it would have been unknown in the Collector's office, nor is it reasonable to suppose that the management would have been confided to her had such been her character. It was argued, indeed, that she may have become by that time capable ; but it is to be observed that a long course of neglect and mismanagement, which is attributed to her, would not be a school of improvement.

It was argued that the complainant was not to be bound by the *Ranee's* alllegations of her own competency ; that she had tasted the sweets of management, and would desire their continuance. Certainly the complainant is not to be bound by her assertion ; but it is not the assertion that is relied on as confirmation. What is relied on is the result of the contest, and the acknowledgment of her as one competent to the management of the estate by an officer interested in its right administration.

Their Lordships cannot but concur with the *Sudder Ameen* in thinking that these circumstances do materially confirm the

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story of the attesting witnesses as to the *Ranee's* execution of the deed. The story of her non-execution of it is based, in a considerable degree, on a supposition of her incapacity. That the deed is hers, is, in the opinion of their Lordships, further confirmed by the great improbability of the history which some of the witnesses of the respondent give as to the *factum* of the instrument. The story told by the witnesses Heera Lal and Gya Pershad Patuk, is so destitute of probability, so little in harmony with the ordinary conduct of men in like circumstances, that their Lordships can place no reliance upon it. According to the case of the respondent, this Bond was fraudulently executed in the name of the *Ranee*, without her sanction or knowledge, in order to fix a false charge of Rs. 15,000, in the defendant's favour, on the property of the infant *Raja*. The defendant and several associates were, according to this story, conspiring together for this object. According to the witnesses, who give nearly *verbatim* the same account of the transaction, these conspirators had witnesses ready, though not present, who were to attest consciously the false deed as true; yet such is at once the impatience and the folly of these conspiring parties, that every one of the witnesses, each of whom is described as dropping in by chance as it were, is solicited without any assigned adequate motive, and with no previous sounding, to become a party to this fraud by consciously attesting the false deed as true. Each witness declines, and each is entreated to secrecy; and each preserves the secret inviolate, contrary to duty, and without any assigned motive for secrecy. The communication and the concealment are both without motive according to the account which is given us. And the story of this utterly needless communication of his crime, is told of a man used to business, intelligent, and described by the respondents as the habitual accomplice of crafty and designing men, the *Karindas*, in acts of fraud.

Taking the whole circumstances as to the *factum* of this instrument into consideration, their Lordships concur in the finding by the *Sudder Ameen* as to it.

Next, as to the consideration for the Bond. The argument for the appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for according

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to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is *primâ facie* to support the charge, and the *onus* of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the *Sudder Dewanny Adawlut* at Agra, in the case of *Oomed Rai v. Heera Lall* (1) was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but can not reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently, this *dictum* may perhaps be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent on them. Thus, where the mortgagee himself with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and

(1) 6 Sud. Dew., N. W. P., 218.

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prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

It is to be observed that the representations by the Manager accompanying the loan as part of the *res gestæ*, and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the time of Sir Edward Hyde East, reported in his decisions in the 2nd volume of *Morley's* "Digest" seems the foundation of this practice. See also the case of *Brown* v. *Ramkunaee Dutt* (1).

It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after a lapse of time, and enjoyment and apparent acquiescence; consequently, if, as is the case here, as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable. The case before their Lordships is one of a mixed character; the existing security represents loans and transactions at various times and under varying circumstances: it is a consolidating security; and as to part, at least—namely, the ancestral debt—there is, in the opinion of their Lordships, ground to raise a *primâ facie* presumption in the appellant's favour of a consideration that binds the estate. It is unnecessary to the decision to pursue the inquiry as to the other items of charge, but that part of it which relates to the advance for payment of the revenue seems to be at least *primâ facie* proved as against the estate. And, as to the whole charge, there is also at least *primâ facie* evidence in the admissions of the plaintiff, proved by several witnesses, uncontradicted on the point. As to the debt of the ancestors, it was said that it was already secured, and that the estate being

(1) 11 Sud. Dew. Adaw. Rep., 791.

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ancestral, could not, according to the law current in the North-Western Provinces, be charged, in the hands of the heir, for an ancestor's debt. But it is to be observed as to the change of security, that there was a reduction of interest; it is, therefore, a transaction, *primâ facie*, for the benefit of the estate; and though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt, by the father, as, indeed, the case above cited from the 6th volume of the Decisions of the *Sudder Dewanny Adawlut*, North-Western Provinces, incidentally shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu Law, the freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt. Their Lordships, therefore, are clearly of opinion that a *primâ facie* case of charge for something was made out; and it is not necessary to determine, nor, indeed, have their Lordships the necessary facts before them to enable them to determine, for how much, if for anything, this deed must ultimately stand as a security.

One point remains to be considered, namely, whether, in taking the account between these parties, the defendant is to be charged, as mortgagee in possession, with the actual rents and profits, or only with the rent fixed by the *pottah*. It is said for the appellant, that the *Sudder Dewanny Adawlut* did not set aside the *pottah*. In terms they certainly did not. But their Lordships think that it was part of one mortgage-security, consisting of several instruments of equal date with the mortgage Bond; and that it was intended to create, not a distinct estate, but only a security for the mortgage-money. Mr. Palmer contended that a stipulation such as this *pottah* evidences, may stand in India between mortgagor and mortgagee, and that the Regulations as to interest do not touch such a case. The Regulations provide for the case of an evasion of the law as to interest by invalidating the mortgage security, and forfeiting the claim of the mortgagee to his principal and interest: but Mr. Palmer contends that where there is no such evasion, and

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a *bonâ fide* and fair rent is fixed upon as representing, *communibus annis*, the rents and profits of the estate, the Court ought to stand on that, the agreement of the parties, and not to direct the taking of the accounts between the mortgagor and mortgagee on any other basis. It is certainly possible that, by reason of the provision that the rent shall be a fixed one, notwithstanding losses and casualties the mortgagee might be a loser, in his character of lessee, on an account calculated on this basis; but notwithstanding that contingency, their Lordships think that, as it was not meant that the principal should be risked, it was virtually a provision to exclude an account of the rents and profits, and that the decree of the *Sudder Dewanny Adawlut*, directing an account of the actual rents and profits, therefore, proceeds on the right principle, and is in accordance with the true nature of the security and the spirit of the Regulations.

In the case of *Roy Juswunt Lall* v. *Sreekishen Lall*, (1) the Court seems to have thought that where a mortgage lease was granted, and whilst the term was running, the mortgage account could not be taken; but it appears from that case, that in former decisions of that Court not reported, where the lease had expired, the Court directed the account to be taken on the ordinary footing of the receipt of rents and profits of the mortgaged estate. Their Lordships think that, under the Regulations, unless the principal is meant to be risked, and is put in risk, the estate created as part of a mortgage security, whatever be its form or duration, can be viewed only as a security for a mortgage debt, and must be restored when the debt, interest, and costs are satisfied by receipts.

Upon the whole, their Lordships are of opinion that the cause must be sent back for further inquiry. They think it desirable, however, in order to prevent a future miscarriage, to state the general principles which should be applied to the final decision of the case.

The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular

(1) (1852) 14 Sud. Dew. Adaw., p. 577.

instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismangement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or hâs arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *malâ fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bonâ fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived.

Their Lordships will, therefore, humbly report to Her Majesty in the following terms :—

"Their Lordships are of opinion that the *Ranee* ought to be deemed to have executed the mortgage Bond, dated *Assar Soodee Poornamashee*, in the pleadings mentioned, as and in the character of guardian of the infant Lâl Inderdoun Singh

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"And their Lordships are of opinion that the validity, force, and effect of the Bond, as to all and each of the sums, of which the sum of Rs. 15,000, thereby purporting to be secured, is composed, depend on the circumstances under which the sums, or such of them as were advanced by the appellant, were respectively so advanced by him, regard being had also, in so far as may be just, to the circumstances under which the same were respectively borrowed.

"And their Lordships are also of opinion that, assuming the Bond to be invalid and ineffectual, the Appellant would, nevertheless, be entitled to the benefit of any prior mortgage or mortagages paid off by him affecting the property comprised in the Bond, if and in so far as such prior mortgage or mortgages was or were valid and effectual.

"And their Lordships, therefore, are of opinion that the decrees of the *Zillah* and *Sudder* Courts respectively ought to be reversed, and the cause remitted to the *Sudder* Court, with directions that inquiry be made into the several matters aforesaid, and that all such accounts be taken and such other inquiries made as having regard to such matters and to the circumstances of the case, may be found to be necessary and proper, with directions also that the *Sudder* Court do proceed therein as may be just, both with respect to the said mortgage Bond and the several instruments of even date therewith; and that the costs of the appeal be costs in the cause, to be dealt with by the *Sudder* Court."

NOTE.—The principle laid down in this case regarding the authority of the manager for an infant heir to charge the estate belonging to the latter has been applied to various cases of dealings with property by persons having by law only a limited power over it; as for instance to the case of a *shebait* of an estate belonging to a Hindu deity (*Prosunno Kumari Debya* v. *Golab Chand Baboo*, L. R., 2 I. A., 145; *Koonwer Doorga Nath Roy* v. *Ram Chander Sen*, I. L. R., 2 Calc., 341); to the case of a Hindu widow dealing with the estate inherited from her husband (*Kameswar* v. *Run Bahadoor*, I. L. R., 6 Calc., 843); to the case of fathers or other joint owners, managing property governed by the Mitakshara Law (*Soorendra* v. *Nundun*, 21 W. R., 196); and to the case of a manager for a lunatic (*Gouree Nath* v. *Collector of Monghyr*, 7 W. R., 5).

The principle has been embodied in the "Transfer of Property Act."

The doctrine of the pious liability of a Hindu son to pay the debts of his father, which finds definite expression in this case, has been subsequently elaborated so as to be almost destructive of another doctrine of Hindu law, namely, that of equal ownership of father and son in ancestral property governed by the Mitakshara. [See *Suraj Bunsi Koer* v. *Sheo Prasad*, *infra*.]

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v.
RAMKISHORE ACHARJ CHOWDHURY.

(Reported in 10 Moo. I. A., 279; S. C. 3 W. R. P. C., 15.)

The *Onoomuttee puttro* (deed of permission) of 1819 referred to in the judgment was in these words:

"Gour Kishore Surma

"By the pen of Ram Nursing Surma.

"To the abode of all goodness, Chundrabullee Debia,

"This is an *Onoomuttee puttro*, (deed of permission) to the following purport:—Prior to the birth of a male child from your womb, I had executed in your favour an *Onoomuttee puttro* on the subject of your receiving an adopted son. Subsequently, by the will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race *(gotra)*, or from a different race *(gotra)*, for the purpose of performing mine and your *sradh* and other rites, and for the *sheba* (service) of the Gods and for the succession to the Zemindary and other property; on which, if the adopted son be non-existent, which God forbid, then you shall, according to your pleasure, on the failure of one, adopt other sons in succession, to avoid the extinction of the *pinda* (funeral cake or offering); that *dattaka* (adopted) son shall be entitled to perform your and my *sradh*, etc., and that of our ancestors, and also to succeed to the property. To this end I execute this *Onoomuttee puttro*. Dated the 25th Kartic, 1226 B. S."

THE RIGHT HON. LORD KINGSDOWN delivered the following judgment. 1865.

The appeal in this case arises out of a suit brought by the respondent, Ram Kishore, to recover certain estates in Bengal, which were claimed by and were in the possession of the appellant and of Rajendra Kishore, whom she alleged to be her adopted son.

The facts, so for as they are necessary to make our judgment intelligible, are these:—

Gour Kishore Acharj, being the owner of considerable estates

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in Bengal, died in the year 1821. He left surviving him a widow named Chundrabulee Debia and an only son named Bhowanee Kishore.

At the time of his father's death, Bhowanee Kishore, who succeeded as his heir, was about four years of age. He attained, however, his majority, and married the Appellant Bhoobun Debia. He died in the month of August, 1840, being then about twenty-four years old. He left no issue, and Bhoobun Debia, his widow, became the heir of his property, as well ancestral as of other estates which had been purchased with his own money during his life.

Immediately upon the death of Bhowanee Kishore, an instrument was set up, as being his Will, by Chundrabulee Debia, his mother, and Bhoobun Debia, his widow. By this instrument, power to adopt a son was given to Bhoobun Debia, and until such adoption was made, the income of the estates was given to Chundrabulee Debia and Bhoobun Debia.

Under this alleged Will, these two ladies took possession of the estates of Bhowanee Kishore, and remained in the enjoyment of them for nearly four years.

In December, 1843, Bhoobun Debia professed to exercise the power alleged to have been given to her by the instrument already referred to, and adopted a boy called Rajendra Kishore.

Upon this, a quarrel appears to have arisen between Chundrabulee Debia and Bhoobun Debia, and Chundrabulee Debia alleged that the supposed Will of Bhowanee Kishore, under which she had so long been in the enjoyment of half his property, was a forgery, and had not been made till after his death, and that Bhoobun had no power of adoption. She further set up an instrument called an *Onoomuttee puttro*, or deed of permission by which she alleged that a power to adopt a son had been given to her by her husband Gour Kishore, in his life-time, and which power, in the events which had happened, she claimed a right to exercise.

She accordingly adopted, or professed to adopt, the respondent, Ram Kishore, as the son of Gour Kishore, her late husband.

Bhoobun Debia, on behalf of Rajendra Kishore, her adopted son, having obtained possession of all the property of Bhowanee

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Kishore, the suit in which the present appeal was brought, was instituted in 1852, in the Zillah Court of Mymensing, by a next friend of Ram Kishore, on his behalf, against Bhoobun Debia and Rajendro Kishore, and certain other persons, the plaintiff claiming, as the adopted son of Gour Kishore, the whole property, ancestral and acquired, of Bhowanee Kishore. To this suit Chundrabullee Debia was made a defendant, instead of suing as a plaintiff, on behalf of her son; that course being adopted probably with a view to avoid any prejudice which might arise from the inconsistency of her previous conduct with the title now set up for her son.

When the case came before the Sudder Ameen, he was of opinion that the plaintiff must recover upon the strength of his own title, and that if such title failed, it was unnecessary to decide upon the case of the defendants.

He was of opinion that the plaintiff had failed to prove his title, and he, therefore, dismissed the suit, expressing at the same time a strong opinion in favour of the defendant's adoption.

He awarded the costs of the suit to the defendants, with the exception of Chundrabullee Debia, whom he held to be really the promoter of the suit.

From this decision there was an appeal to the *Sudder Dewanny* of Calcutta. The case was heard upon several different occasions. Finally, the Judges were unanimously of opinion that the adoption of Rajendro Kishore was invalid, and that the Will of Bhowanee Kishore, purporting to create the power of adoption, was a forgery. They were equally unanimous in holding that the *Onoomuttee puttro* of Gour Kishore was a genuine and valid instrument, and that if the power to adopt continued at the time when Chundrabullee Debia professed to execute it, there had been a valid adoption. One of the Judges was of opinion that the power was gone, and that the adoption was invalid. The other two were of opinion that the power existed at the time of the adoption, and a decree was made, therefore, in favour of the plaintiff as to the ancestral property of Bhowanee Kishore, but not as to his self-acquired property; and the costs of the parties were ordered "to be borne by them in proportion to the amount of the property decreed or dismissed."

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The case now comes before us on appeal by Bhoobun Debia, as representing her own rights and the rights of a son whom she had adopted in lieu of Rajendro Kishore, who is dead, and on a cross-appeal by Ram Kishore, complaining that the decree in his favour ought to have included the self-acquired property as well as the ancestral property of Bhowanee Kishore.

On the hearing of these appeals, we expressed a clear opinion, without calling on the respondent's Counsel, that the Court below was right in holding that the alleged Will of Bhowanee Kishore was a forgery. The evidence is irresistible that it was contrived by the different members of his family after his death, in order to give effect to an arrangement which they considered would be for the common benefit. This being so, and no power of adoption having been proved or alleged to have been given by parol, the adoption of Rajendro Kishore and of the son now substituted for him, must of course be held in this suit to be invalid.

The next question is, as to the validity of the adoption of Ram Kishore. We see no reason to dissent from the opinion of the Court below upon the facts of the case, *viz.*, that the *Onoomuttee puttro* of Gour Kishore is a genuine instrument, and that, supposing the powers given by it to have been in force when the adoption under it took place, the adoption was good; but we think it unnecessary to examine into the genuineness of this instrument, as we are of opinion that at the time when Chundrabullee Debia professed to exercise it, the power was incapable of execution.

It will be necessary to go into this part of the case with some minuteness.

It appears that some years before the birth of Bhowanee, and in the year 1811 of our era, Gour Kishore being then childless, and anxious, as Hindus generally are, to provide a son by adoption, if he should have no natural-born son, executed an *Onoomuttee puttro* on the 30th of March, 1811, by which he gave power of adoption to Chundrabullee, his wife.

In 1819, two years after the birth of Bhowanee, he executed the instrument on which present question depends, which is in these words. [His Lordship read the deed, *ante*, p. 15.]

The first question which arises is as to the construction of this instrument. It seems to have been considered by the

two Judges of the Sudder Court, who decided in favour of the respondent (certainly by one of them), that the document was to be regarded as a Will, and as containing a limitation, on failure of male issue of the Testator, in the life-time of Chundrabullee Debia, of the estate of the Testator, to a son to be adopted by Chundrabullee Debia, as a *persona designata*; and one of the Judges, in a very elaborate argument, refers to Mr. Fearne's celebrated treatise on Contingent Remainders, in order to show that such a devise by the English law would be valid. There is no doubt that by the decision of Courts of Justice, the testamentary power of disposition by Hindus has been established within the Presidency of Bengal; but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of a state of a society differing as far as possible from that which prevails amongst Hindus in India.

But their Lordships are quite satisfied that there is in this case no room for the application of any such doctrines. The instrument before us is merely what it purports to be, a deed of permission to adopt; it is not of a testamentary character, it was registered as a deed in the life-time of the maker; it contains no words of devise, nor was it the intention of the maker that it should contain any disposition of his estate, except so far as such disposition might result from the adoption of a son under it. He mentions the objects which induced him to make the deed—religious motives, the perpetuation of his family, and the succession to his property; but it was by the adoption, and only by the adoption, that those objects were to be secured and only to the extent in which the adoption could secure them.

The main ground of the decision in the Court below appears, therefore, to fail, and this instrument must be construed, and its effect must be determined, in just the same way as if it had been made in one of the Provinces of India, in which the power of testamentary disposition is not recognized.

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How, then is the deed to be construed when we regard it merely as a deed of permission to adopt? What is the intention to be collected from it, and how far will the law permit such intention to be effected? It must be admitted that it contemplates the possibility of more than one adoption; that it shows a strong desire on the part of the maker for the continuance of a person to perform his funeral rites, and to succeed to his property; and that it does not in express terms assign any limits to the period within which the adoption would be made. But it is plain that some limits must be assigned. It might well have been that Bhowanee had left a son, natural-born or adopted, and that such son had died himself, leaving a son, and that such son had attained his majority in the life-time of Chundrabullee Debia. It could hardly have been intended that after the lapse of several successive heirs a son should be adopted to the great-grand-father of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, whould have been satisfied.

But whatever may have been the intention, would the law allow it to be effected? We rather understand the Judges below to have been of opinion that if Bhowanee Kishore had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to Chundrabullee Debia would have been at an end.

But it is difficult to see what reasons could be assigned for such a result which would not equally apply to the case before us.

In this case, Bhowanee Kishore had lived to an age which enabled him to perform—and it is to be presumed that he had performed—all the religious services which a son could perform for a father. He had succeeded to the ancestral property as heir; he had full power of disposition over it; he might have alienated it; he might have adopted a son to succeed to it if he had no male issue of his body. He could have defeated every intention which his father entertained with respect to his property.

On the death of Bhowanee Kishore, his wife succeeded as heir to him, and would have equally succeeded in that character in exclusion of his brothers, if he had had any. She took a vested estate, as his widow, in the whole of his property. It

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would be singular if a brother of Bhowanee Kishore, made such by adoption, could take from his widow the whole of his property, when a natural-born brother could have taken no part. If Ram Kishore is to take any of the ancestral property, he must take all he takes by substitution for the natural-born son, and not jointly with him.

Whether under his testamentary power of disposition Gour Kishore could have restricted the interest of Bhowanee Kishore in his estate to a life-interest, or could have limited it over (if his son left no issue male, or such issue male failed) to an adopted son of his own, it is not necessary to consider; it is sufficient to say that he has neither done nor attempted to do this. The question is, whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of Gour Kishore would not have taken.

This seems contrary to all reason and all the principles of Hindu law, as far as we can collect them.

It must be recollected that the adopted son, as such, takes by inheritance and not by devise. Now, the rule of Hindu law is, that in the case of inheritance, the person to succeed must be the heir of the last full owner. In this case, Bhowanee Kishore was the last full owner, and his wife succeeds, as his heir, to a widow's estate. On her death, the person to succeed will again be the heir at that time of Bhowanee Kishore.

If Bhowanee Kishore had died unmarried, his mother, Chundrabullee Debia, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have devested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the Text-Books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and devested.

The only case referred to in the argument before us, or in the judgment below, as tending in that direction, is that of

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Lackinarain Tagore, reported by Sir F. Macnaghten, "Considerations on Hindoo Law," p. 168; but it is incontestable that in that case the disposition depended wholly on the testamentary power. The authority to adopt was only subsidiary to the disposition of the property. The Will of Lackinarain Tagore is set forth in full in No. 5, p. 9, of the Appendix to Sir F. Macnaghten's work. It is termed a Will; it appoints an executor; it disposes of the whole estate; gives various legacies; gives the residue to the child of which his youngest wife was pregnant, whether a son or a daughter, in which latter case it would obviously break the legal order of succession; and directs that at that child's death the adoption of a son shall take place. We have already said that we express no opinion as to the power of Gour Kishore to have made the disposition now insisted on by the appellant by devise of his estates, but we find no such devise in the instrument which he has excuted.

An additional difficulty in holding the estate of the widow of Bhowanee Kishore to be devested may, perhaps, be found in the doctrine of Hindu law, that the husband and wife are one, and that as long as the wife survives, one-half of the husband survives; but it is not necessary to press this objection.

Upon the whole, we must humbly report to Her Majesty our opinion on the original appeal that the plaintiff's suit ought to be dismissed; but, inasmuch as the main expense of it has been occasioned by the appellant setting up a state of facts which has turned out to be untrue, and disputing the facts alleged by the respondents, which have been established, we think that no costs should be awarded to either party of the suit or of the original appeal. The cross-appeal is wholly groundless, and we must advise that it be dismissed with costs.

The several Orders and Decrees complained of, so far as they are inconsistent with the above recommendations, must be reversed.

NOTE.—The validity of the adoption of Ram Kishore was again discussed and finally negatived in *Padmakumari* v. *Court of Wards* (I. L. R., 8 Calc., 302) when the estate was, after the death of Bhoobun Moyee and Chundrabullee, claimed by the great-grandson of Chundrabullee's grand-father whose claim, however, failed by reason of the existence of a nearer heir to Bhowanee Kishore in the person of the adopted son of Chundrabullee's father. All the important

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cases on the main point decided in the principal case will be found referred to and discussed in the recent case of *Manikyamala* v. *Nandakumar* (1906) [I. L. R., 33 Calc., 1306]

It should be borne in mind, however, as has recently been held by the Judicial Committee of the Privy Council in a case from the Madras Presidency, that, where the husband had expressed a general intention to be represented by a son, the authority to adopt given to her is not exhausted by the first adoption. (*Suryanarayan* v. *Venkataramana* L. R., 33, I. A., 145.)

KATAMA NATCHIAR
v.
RAJA OF SHIVAGUNGA.

(Reported, 9 Moo. I. A., 543; s. c. 2 W. R., P. C., 31.)

The following judgment was delivered by the RIGHT HON. THE LORD JUSTICE TURNER.

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The subject of this appeal, and of the long litigation which has preceded it, is the *Zemindary* of Shivagunga, in the District of Madura and Presidency of Madras.

This *Zemindary* is said to have been created in the year 1730, by the then *Nabob* of the Carnatic, in favour of one Shasavarna, on the extinction of whose lineal decendants in 1801, it was treated as an escheat by the East India Company, which had then become possessed of the sovereign rights of the *Nabob* of the Carnatic, and was granted by the Madras Government to a person whom we shall distinguish by one of his many names, as Gowery Vallabha Taver. He had an elder brother named Oya Taver, who pre-deceased him, dying in 1815. The *Zemindar* himself died on the 19th of July, 1829.

He had had seven wives, of whom three only survived him. Of the deceased wives, the first had a daughter (since dead), who left a son named Vadooga Taver: the second had a daughter named Bootaka Natchiar; the third had two daughters, Kota Natchiar, and Katama Natchiar, the present appellant; and the fourth was childless. The three surviving widows were Anga Mootoo Natchiar, Purvata Natchiar, and Mootoo Verey Natchiar. Of these Purvata Natchiar was *enceinte* at the time of her husband's death, and afterwards gave birth to a daughter, named Sowmia Natchiar. The two others were childless.

Oya Taver, the brother, left three sons, of whom the eldest was named Mootoo Vadooga.

The *Zemindary* is admitted to be in the nature of a Principality—impartible, and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general

Hindu law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject.

Hence if the *Zemindar*, at the time of his death, and his nephews were members of an undivided Hindu family, and the *Zemindary* though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the *Zemindar*, at the time of his death, was separate in estate from his brother's family, the *Zemindary* ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestable; but Gowery Vallabha Taver's widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is that, even if the late *Zemindar* continued to be generally undivided in estate with his brother's family, this *Zemindary* was his self-acquired and separate property, and as such was descendible, like separate estate, to his widows and daughters and their issue preferably to his nephews, though the latter, as coparceners, would be entitled to his share in the undivided property. Upon this view of the law the question whether the family were undivided or divided becomes immaterial. The material question of fact would be whether the *Zemindary* was to be treated as self-acquired separate proporty, or as part of the common family stock.

Whichever may have been the proper rule of succession, it is certain that, if not on the death of Gowery Vallabha Taver, at least on the failure of his male issue, being demonstrated by the birth of his posthumous daughter, his nephew, Moottoo Vadooga, obtained possession of the *Zemindary*. He seems to have set up an instrument which in the proceedings is called a Will. On the appellant's side this is treated as a forgery. The respondent, denying the forgery, does not now treat the document as a testamentary disposition, or as material to his title; and it may, therefore, be dismised from consideration. Moottoo Vadooga obtained possession with the concurrence of various members of the family, and of Government and its officers. He afterwards obtained from the then three surviving widows

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the *Razinamah*, or agreement. He continued in possession without litigation, if not without dispute, until his death, which took place on the 21st of July, 1831; and was then succeeded by his eldest son, Bodha Gooroo Swamy Taver.

Soon after this event began the litigation concerning this property, which has now continued upwards of thirty years. Its history may be conveniently divided into three periods: the first beginning with the institution of suit, No 4 of 1832, and ending with the Order of the Queen in Council in 1844; the second beginning from the date of that Order, and ending with the death of the widow, Anga Mootoo Natchair, on the 23rd of June, 1850; and the third being that which covers the proceedings which have been had since Anga Mootoo Natchiar died.

The suit, No. 4 of 1832, was brought by Velli Natchair the daughter of Gowery Vallabha Taver, by his first wife, on behalf of her infant son, Mootoo Vadooga. It claimed the *Zemindary* for the infant by virtue of an *Arze* said to have been sent by the Collector to Gowery Vallabha Taver in 1822, according to which the succession would be to the son of a daughter in preference to his widows, and *á fortiori* in preference to his brother's descendants. The defence to this suit insisted that the *Zemindary* had been granted to Gowery Vallabha Taver solely in consequence of his relationship to the former *Zemindars*, and was, therefore, to be treated as part of the undivided family estate, and, as such, descendible to the eldest of the male co-parceners in preference to any descendant in the female line from Gowery Vallabha Taver. The reply did not raise any distinct issue as to the character of the family, whether divided or undivided, but insisted that the *Zemindary* was to be regarded as the self-acquired and separate property of Gowery Vallabha Taver; and ought to pass by virtue of the *Arze* to the Plaintiff.

In 1833, two other suits were instituted against the *Zemindar* in possession. Of these, that distinguished as No. 4 may be left out of consideration, inasmuch as the Plaintiff in it rested his title on an alleged adoption by Gowery Vallabha Taver, of which he failed to give satisfactory proof.

Such a title, if established, would of course have been paramount to the claims of either the nephews or the widows.

The suit, No. 3 of 1833, is, however, the most important, with reference to this appeal, of the three suits now under consideration. It was brought by Anga Mootoo Natchiar, the fifth wife, and the elder of the three widows of Gowery Vallabha Taver. She set up an adoption, or *quasi* adoption of Gowery Vallabha Taver, by the widow of the last *Zemindar* of the elder line, and treated this as the consideration, or a principal consideration for the grant of the *Zemindary* made to him by the East India Company, and she insisted that Mootoo Vadooga Taver, on her husband's death, got possession of the *Zemindary*, of which she was the legal heiress, by means of the forged Will. The defence to this suit, so far as it related to the title of the *Zemindar* in possession, was substantially the same as that made to the suit, No. 4 of 1832; but it also denied the alleged forgery of the will, and insisted on the *Razinamah* executed by Anga Mootoo Natchiar and the other widows to Mootoo Vadooga Taver. In her reply, Anga Mootoo Natchiar did not raise any distinct issue as to the division or non-division of the family. She submitted, as an issue of fact, that the *Zemindary* had been acquired by the sole exertions and merits of her husband; and as an issue of law, that what is acquired by a man, without employment of his patrimony, shall not be inherited by his brothers and co-heirs, but if he dies without male issue shall descend to his widows, his daughters and parents, before going to his brothers or remoter collaterals.

These three suits were all dismissed by the Provincial Court. We have not the decree or decrees of dismissal, but it seems probable that they were heard and disposed of together. It also appears that, although there was not in any of them a distinct issue, whether Gowery Vallabha Taver and his nephews were or were not an undivided Hindu family, some evidence was given in the suit, No. 4 of 1832, to show that he and his brother were separate in estate. There was an appeal in each of the three suits, and these were heard together, and disposed of by the decree of the *Sudder* Court. That decree dismissed No. 4 of 1833, on the ground that the plaintiff had failed to prove his

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alleged adoption by Gowery Vallabha Taver, and it dismissed the suit No. 4 of 1832 on the ground that the succession to the *Zemindary* was governed by the general Hindu law, and not by any particular or customary canon of descent; so that, if descendible as separate estate, it would go to the widows of Gowery Vallabha Taver in preference of a grandson by a daughter. In the suit, No. 3 of 1832, it was decided, *first*, that as a matter of fact the *Zemindary* was the self-acquired and separate property of Gowery Vallabha Taver; *secondly*, that according to the opinion of the Pundits whom it had consulted, the rule of succession to the *Zemindary*, though self-acquired, would depend on the fact whether the brothers had or had not divided their ancestral estate; that in the former case it would belong to the widow, and in the latter to the nephew; *thirdly*, that upon the whole evidence the brothers must be taken to have divided their ancestral property; and lastly, that the plaintiff, Anga Mootoo Natchiar, was entitled to recover the *Zemindary*, not having forfeited her rights by the execution of the *Razinamah*.

Against this decree the *Zemindar* then in possession appealed to Her Majesty in Council. The Order made on that appeal on the 19th of June, 1844, was that the decree of the *Sudder* Court should be reversed, with liberty to the respondent, Anga Mootoo Taver, to bring a fresh suit, notwithstanding the decree of the Provincial Court, at any time within three years from the filing of that Order in the *Sudder Dewanny Adawlut*. The grounds on which their Lordships who recommended this Order proceeded were, as appears from the judgment delivered by Dr. Lushington, that the *Sudder* Court had miscarried in deciding the question of division, which was not one of the points reserved in the cause, nor was expressly raised upon the pleadings, but that the respondent ought to be allowed to remedy the omission in a new suit. And their Lordships added, that though they could make no Order on the subject, it would be exceedingly desirable that it should be known to all those who were interested in the property that the question of division or non-division appeared to be the only point on which the main question of title to the property would ultimately depend.

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On the 20th of Agust, 1845, Anga Mootoo Natchair commenced her second suit *in formâ pauperis*. In the interim Bodha Swamy Taver had died, and the *Zemindary* had passed to his brother, Gowery Vallabha Taver, the father of the respondent, and he with a younger brother were the defendants to the new suit. In her plaint the widow after stating the pedigree of the family, some of the former proceedings, and the desire of Velu Natchair, the widow of the last *Zemindar* of the elder line, to make Gowery Vallabha Taver, the first of that name whom we have mentioned, her successor, proceeds to allege, that with that object she had caused him and his elder brother, Oya Taver, to make a partition of their ancestral property as early as the year 1792. The plaintiff then excuses her omission to plead this fact in the previous suit by saying that she had been advised it was only necessary for her to show that her husband had been adopted by Velu Natchair, and that the *Zemindary* was his self-acquisition. She then proceeds to allege, that on the death of Velu Natchair, he actually became *Zemindar* until he was dispossessed by the usurpers; on whose defeat and destruction by the East India Company, he was again put into possession under their grant. She also in this suit makes the alternative case, that even if no partition of their ancestral property took place between Gowery Vallabha Taver and his brother, Oya Taver, she, as the eldest widow, was entitled to the *Zemindary*, as a separate acquisition, in preference to that brother's descendants, and pleads the decision, in what is called the *Sandayar case*, to prove that such is the Hindu law, and that the opinion given in the former case by the Pandits to the contrary, was erroneous.

In his answer, the first and principal defendant recapitulated the several facts relied upon by Bodha Gooroo in the former suit as constituting his title. He insisted that by the decision of the Judicial Committee of the Privy Council the contest was narrowed to the issue whether the brothers were undivided in estate or not, and that the plaintiff should have rested her claim on that issue. He contended that there had been no partition. The points recorded in the suit are thus somewhat vaguely stated:—"The plaintiff to prove, by means of documents and witnesses, that division took place in 1792. As the

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defence is but a denial of this circumstance, the defendant can not be called upon to establish the negative side by direct proof. But the defendant will have to prove the points mentioned in paragraphs 2 to 5 of the answer; and he is required to use, if possible, strong arguments against the points particularly spoken of by the plaintiff."

A large body of evidence is, in fact, given by each side on the question of division or non-division. The case was heard by the Civil Judge, Mr. Baynes, whose decree is dated the 27th of December, 1847. The effect of it was, that the only question really open between the parties was that of division or non-division; that the plaintiff had failed to prove the partition between Gowery Vallabha Taver and his brother, Oya Taver; and that her suit must be dismissed with costs.

Against this decree, on the 6th of April, 1848, Anga Mootoo Natchiar appealed to the *Sudder* Court. The defendant, Gowery Vallabha, then died, and his infant son, the present respondent, came in, and on the 5th of November, 1849, filed an answer to the appeal. Before the appeal was heard and on the 24th of June, 1850, Anga Mootoo Natchiar also died, and with her death ended the second stage of this long litigation.

On the death of Anga Mootoo Natchiar the Court seems to have issued a notice in the form ordinarily used on the abatement of an appeal by the death of an appellant, calling upon the heirs of the deceased to come forward and prosecute the suit. This form of notice, it is obvious, was not strictly applicable to a case like the present, where, upon the death of a Hindu widow, the right of action formerly vested in her devolves not upon her heirs, but upon the next heirs of her husband; and to this circumstance may be traced some of the confusion which is observable in the subsequent proceedings. Such as it was, however, the notice brought into the field three sets of claimants. The first consisted of Bootaka Natchiar, the daughter of Gowery Vallabha Taver by his second wife, and Kota Natchiar and the present appellant, his daughters, by his third wife. They claimed as the rightful heirs of the *Zemindary*, if it passed as separate property, next in succession to the widow, Anga Mootoo Natchiar; but considering its impartible nature, they expressed their willingness that it should be

enjoyed first by Bootaka Natchiar for her life, next by Kota Natchiar for her life, and lastly by the appellant. They treated Sowmia Natchiar, the daughter by the sixth wife, as excluded from the succession by reason of her marriage with Bodha Gooroo, and of her being then a childless widow.

Sowmia Natchiar, however, came forward by a separate petition, claiming to be heiress both to Anga Mootoo Natchiar and the *Zemindary*, by virtue of an instrument alleged to have been executed by Anga Mootoo Natchiar in her life time.

A third claimant was Moottoo Vadooga, the plaintiff in the dismissed suit of 1832. His contention was, that though the decree in that suit may have been right in preferring to his claim that of Anga Mootoo Natchiar, his title as grandson was nevertheless preferable to that of daughters, and that on the death of the widow he became entitled to the *Zemindary*.

Counter-petitions were filed on behalf of the respondent, objecting to the revival of the appeal by any of these claimants; and it is observable that he then insisted that they ought to be compelled to bring fresh suits for the trial of their alleged rights, in order to give him the means of alleging and proving certain special matters of defence against them, of which he would not have the benefit in the suit of Anga Mootoo Natchiar.

The Sudder Court, in dealing with these claims to prosecute the appeal, has made three different and inconsistent orders.

By the first, dated 21st of October, 1850, it held that none of the claimants could prosecute the appeal, which it directed to be removed from the file, but left any of them at liberty to bring a new action to enforce their respective claims, provided it was commenced before the 30th of April, 1851.

They all petitioned for a review of this Order; counter-petitions were filed on behalf of the respondent; and the Court, by its Order of the 1st of May 1851, notwithstanding an adverse opinion given by its Pandits on the 7th of March preceding, reversed its former Order, and directed the appeal to be replaced on the file, and the several claimants to be made supplemental appellants; resolving to hear the appeal, and, if it should be sustained, to determine the mode in which their rights as against each other and the defendant should be tried.

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On the 19th of April 1852, the Court, apparently of its own mere motion on taking up the record of the appeal, reversed this Order of the 1st of May, 1851, and ruled that the several claimants could not be heard on the appeal, but might prosecute their respective rights in the Court of first instance, which Court was to be guided in the admission and hearing of their claims by the Regulations in force, and the appeal was again removed from the file.

Thereupon the respondent shifted his ground, and by a petition dated the 30th of June, 1852, objected to the last Order and prayed for a review of it. His contention then was, that the heirs next in succession to Anga Mootoo Natchiar, according to that course of succession, might have been admitted to carry on the appeal, and that it was a hardship on him to have to litigate his title with them in a new suit. The Court, however, by its proceeding of the 16th of September, 1852, adhered to its Order, giving at the same time a not very intelligible explanation of it.

Of the three daughters of Gowery Vallabha Taver who joined in the first of the above-mentioned applications to the *Sudder* Court, the appellant alone brought a fresh suit. The plaint was not filed until the 5th of December, 1856, but there seem to have been various intermediate proceedings before both the *Zillah* and *Sudder* Courts. These are referred to in the appellant's petition of appeal, but are nowhere stated in detail. Her plaint stated, that her father and his brother, Oya Taver, were divided in estate prior to 1801, and were then living separately; that the *Zemindary* was granted exclusively to the former, and was, therefore, his self-acquisition, and enjoyed by him in exclusion of his brother.

The appellant's title in succession to Anga Mootoo Natchiar is thus stated:—"The *Zemindary*, which is the self-acquisition of the plaintiff's father after his division with Oya Taver, belongs on the death of his widow, Anga Mootoo Natchiar, to his second daughter, the plaintiff, who has male and female issue; whilst his first daughter, Bootaka, has no issue, and the third daughter, Sowmia, is a widow." In the seventh paragraph (though the point is not taken so distinctly as in the suit of Anga Mootoo Natchiar) she claims the *Zemindary* as her

father's self-acquisition, irrespectively of the alleged partition with his brother, and the question of division.

The answer took a formal objection to the suit, namely, that it was brought against the guardian of the infant *Zemindar*, and not, as it ought to have been, against the infant jointly with his guardian. It also insisted on the Regulation of Limitation and the decree of the 27th of December, 1847, as bars to the appellant's claim. It further impeached her title as the heir next in succession to Anga Mootoo Natchiar in that line of succession, alleging that there were descendants of Gowery Vallabha Taver through his elder widows, and it again pleaded many of the facts put in issue in the suit of 1845, as constituting the title of the infant *Zemindar*.

The estate being then in the custody of the Court of Wards, the Collector was made a defendant, and put in a similar answer. Replies and rejoinders were filed; but without settling any issues or taking any evidence in the cause, the Zilla Judge, Mr. Cotton, on the 25th of August, 1859, dismissed the suit, together with the suit, No. 4 of 1857, which had been instituted by Sowmia Natchiar, but with which we have no concern. His reasons for dismissing the appellant's suit were:—*first*, that upon the question of division she was concluded by the decree of 1847, which he treated as a judgment *in rem*, made final by the removal of the appeal from the file; and, *secondly*, that it was clear upon the opinions of the Pandits, that the *Zemindari*, whether self-acquired or not, could not descend to the widow, nor, *á fortiori*, to a daughter, except in the event of the *Zemindar* having been of a divided family.

The appellant appealed from this decision to the *Sudder* Court, praying that the suit might be remanded for adjudication on the merits. Her appeal was dismissed by a decree, dated the 5th of November, 1859. The *Sudder* Court seems also to have considered that by the dropping of the appeal on Anga Mootoo Natchiar's death the decree of 1847 had become final, and, as such, was an effectual bar to the appellant's claim. On the 3rd of March, 1860, the Sudder Court refused to give the appellant leave to appeal to Her Majesty in Council; but special leave was afterwards given on the recommendation of this Committee.

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The present appeal is against the decree of the *Sudder* Court of the 5th of November, 1859, and its Order of the 3rd of March, 1860, and the decree of the 25th of August, 1859. It is also against the Order of the *Sudder* Court of 1852, and the decree of the Civil Court of Madura of the 27th of December, 1847. If, therefore, the latter decree is in truth a bar to the appellant's obtaining effectual relief in her original suit, the appeal seeks by reopening that decree to remove the bar.

And here, before going further, their Lordships deem it right to remark shortly upon the extraordinary doctrine touching this decree which was propounded by the *Zilla* Judge when dismissing the suit of 1856; because if unnoticed here, as it seems to have been unnoticed by the *Sudder* Court, it may find acceptance with other unprofessional Judges, and embarrass the course of justice in India. Their Lordships would otherwise think it unnecessary to observe that a judgment is not a judgment *in rem*, because in a suit by A for the recovery of an estate from B it has determined an issue raised concerning the *status* of a particular person or family. It is clear that this particular judgment was nothing but a judgment *inter partes*; and the only question which could properly arise concerning it in the suit of 1856 was to what extent, as such, it was binding on the appellant.

Their Lordships also feel constrained to observe that the various proceedings, which have taken place since Anga Mootoo Natchiar's death, have signally failed to do justice between the parties, or to dispose of the matters in dispute between them by anything approaching to a regular course of trial and adjudication. When Anga Mootoo Natchiar died, the decree of 1847 was not a final decree. An appeal was pending against it. Either it was binding upon those who in the event of her title being a good one would succeed to the *Zemindari*, or it was not. Those persons were obviously not her heirs, but the next heirs of her husband according to the canon of Hindu law, which defines the succession to separate estate. It ought not, their Lordships conceive, to have been a difficult matter to ascertain the persons answering to this description. If the decree were in its nature binding

on them, they, when ascertained, ought to have been allowed to prosecute the appeal. If the decree were not binding upon them, it ought not to have been treated as an obstacle to the full trial and adjudication of their rights in an original suit. The *Sudder* Court, however, after making two other and inconsistent Orders, referred the parties to an original suit; and yet a suit of that nature when brought by the appellant has been since disposed of against her summarily, and without taking evidence, on the ground that the main and essential issue in it was concluded by the decree of 1847. Therefore, she has fallen, so to speak, between two stools. She has had neither the benefit of the appeal against the decree of 1847, nor a fair trial of her right in a new suit.

It has been ingeniously argued here that for this result the appellant is herself solely responsible; that the suit which she ought to have brought, and which the *Sudder* Court intended her to bring, was one in the nature of a Bill of revivor, or a Bill of revivor and supplement, limited to the object of obtaining from the *Zilla* Court a declaration that she had established her title to stand in the place of Anga Mootoo Natchiar, and carry on the former suit. Whether the procedure of the Courts of the East India Company admitted of such a suit (and no precedent of one has been produced), their Lordships are not prepared to say. But they have a very strong and clear opinion that such was not the nature of the suit which the *Sudder* Court had in its contemplation when it made its Order of 1852. The omission to reserve the hearnig of this appeal until the determination of the new suit; its removal from the file, which seems to be tantamount to its dismissal for want of prosecution, and has been so treated in these proceedings; the contention of the respondent himself in his counter-petitions filed in opposition to the first applications for leave to prosecute the appeal—all point to the conclusion that the new and original suit intended was one in which the whole title of the claimants should be again pleaded and litigated.

The subsequent and obscure Order of the 16th of *September*, 1852, is hardly inconsistent with this, though it seem to contemplate that the decree of 1847 might prove an effectua

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bar to the suit which the Court itself had directed. Yet if there was ground for this apprehension, in what a position had the *Sudder* Court placed the claimants? It had denied to them the power of prosecuting the appeal; it had, thereby made final that which was not in its nature final; and having thus tied their hands, it sent them to wage a contest in a new suit in which, so bound, they could not but fail. If, therefore, the decree of 1847, when final, was binding on the claimants, the *Sudder* Court ought either to have dealt with the appeal on the merits, or it ought to have declared the claimants at liberty to bring and prosecute the new suit, notwithstanding that decree.

In either view of the case, therefore, there was a grave miscarriage of justice in the earliest Order of the *Sudder* Court which is appealed against, *viz.*, that of the 19th of April, 1852.

It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Anga Mootoo Natchiar's lifetime, would have bound those claiming the *Zemindari* in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the *Zilla* Court by any person claiming in succession to Anga Mootoo Natchiar. For assuming her to be entitled to the *Zemindari* at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

But, then, assuming that the succeeding heirs would be so

bound, it was strongly insisted on the part of the respondent that this Committee can do no more than remit the cause with directions to the *Sudder* Court to hear and determine the appeal against the decree of 1847 ; that it cannot itself deal with the merits of a decree of the Civil Court, until they have been determined by the appellate Court. Their Lordships, however, are not of that opinion. The appeal was ripe for hearing by the *Sudder* Court. Their Lordships have before them all the materials for a decision upon the merits, which have been fully argued before them. They conceive, therefore, that they are not bound to yield to this technical objection. On the contrary, they think that it is competent to them to advise Her Majesty to make the Order which the *Sudder* Court ought to have made in 1852, and that it is their duty to do so.

The substantial contest between the appellant and the respondent is, as it was between Anga Mootoo Natchiar and the respondent's predecessors, whether the *Zemindari* ought to have descended in the male and collateral line ; and the determination of this issue depends on the answers to be given to one or more of the following questions :—

First. Were Gowery Vallabha Taver and his brother Oya Taver, undivided in estate, or had a partition taken place between them.

Second. If they were undivided, was the *Zemindari* the self-acquired and separate property of Gowery Vallabha Taver? And if so—

Third. What is the course of succession according to the Hindu law of the south of India of such an acquisition, where the family is in other respects an undivided family ?

Upon the first question their Lordships are not prepared to disturb the finding of Mr. Baynes in the decree of 1847. There are undoubtedly strong reasons for concluding that Gowery Vallabha Taver and his brother, after the acquisition by the former of the *Zemindari*, lived very much as if they were separate. But this circumstance is not necessarily inconsistent with the theory of non-division, if, as was likely, the family and undivided property was very inconsiderable in comparison of the separately enjoyed *Zemindari*. And Anga

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Mootoo Natchiar, having admitted that the brothers had been joint in estate, and alleged a partition at a particular place and time, took upon herself the burden of proving that partition; a burden from which it must be admitted she has not satisfactorily relieved herself. Nor can their Lordships in considering this question be unmindful of the presumption which arises from the lateness of the period at which the allegation of division was first made; and from the silence of the parties in the suits of 1832 and 1833, as well as in the suit of 1823, which is mentioned in these proceedings, upon the subject of a partition which, if it had ever taken place, must have been in the knowledge of all the members of the family.

The second question their Lordships have no hesitation in answering in the affirmative. Every Court that has dealt with the question has treated the *Zemindari* as the self-acquired property of Gowery Vallabha Taver. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the grantee selected by Government was a remote kinsman of the *Zemindars* of the former line does not, their Lordships apprehend, bring this case within the rule cited from Strange's "Hindu Law" by Sir Hugh Cairns.

The third question is one of nicety and of some difficulty. The conclusion which the Courts in India have arrived at upon it, is founded upon the opinion of the Pandits, and upon authorities referred to by them. We shall presently examine those opinions and authorities; but before doing so, it will be well to consider more fully the law of inheritance as it prevails at Madras and throughout the southern parts of India, and the principles on which it rests and by which it is governed. The law which governs questions of inheritance in these parts of India is to be found in the Mitakshara, and in Ch. II., Sec. 1, of that work the right of widows to inherit in default of male issue is fully considered and discussed.

The Mitakshara purports to be a commentary upon the earlier institutes of Yajnawalkya; and the section in question begins by citing a text from that work, which affirms in

general terms the right of the widow to inherit on the failure of male issue. But then the author of the Mitakshara refers to various authorities which are apparently in conflict with the doctrines of Yajnawalkya, and, after reviewing those authorities, seeks to reconcile them by coming to the conclusion "that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue." This text, it is true, taken by itself, does not carry the rights of widows to inherit beyond the cases in which their husbands have died in a state of separation from their co-heirs, and leaving no male issue ; but it is to be observed that the text is propounded as a qualification of the larger and more general proposition in favour of widows; and, consequently, that in construing it, we have to consider what are the limits of the qualification, rather than what are the limits of the right. Now, the very terms of the text refer to cases in which the whole estate of the deceased has been his separate property, and, indeed, the whole chapter in which the text is contained, seems to deal only with cases in which the property in question has been either wholly the common property of a united family, or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in part the common property of a united family, and in part the separate acquisition of the deceased ; and it cannot, we think, be assumed that because widows take the whole estates of their husbands when they have been separated from, and not subsequently re-united with, their co-heirs, and have died leaving no male issue, they cannot, when their husbands have not been so separated, take any part of their estates, although it may have been their husband's separate acquisition. The text, therefore, does not seem to us to govern this case.

There being then no positive text governing the case before us, we must look to the principles of the law to guide us in determining it. It is to be observed, in the first place, that the general course of descent of separate property according to the Hindu law is not disputed. It is admitted that, according to that law, such property descends to widows in default

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of male issue. It is upon the respondent, therefore, to make out that the property here in question, which was separately acquired, does not descend according to the general course of the law. The way in which this is attempted to be done, is by showing a general state of coparcenaryship as to the family property; but assuming this to have been proved, or to be presumable from there being no disproof of the normal state of coparcenaryship, this proof, or absence of proof, cannot alter the case, unless it be also the law that there cannot be property belonging to a member of a united Hindu family, which descends in a course different from that of the descent of a share of the property held in union; but such a proposition is new, unsupported by authority, and at variance with principle. That two courses of descent may obtain on a part division of joint property, is apparent from a passage in W. H. Macnaghten's "Hindu Law," title "Partition," Vol. I, p. 53, where it is said as follows: "According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property; in other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother."

Again, it is not pretended that on the death of the acquirer of separate property, the separately acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted that if the acquirer leaves male issue, it will descend as separate property to that issue down to the third generation. Although, therefore, where there is male issue the family property and the separate property would not descend to different persons, they would descend in a different way, and with different consequences; the sons taking their father's share in the ancestral property subject to all the rights of the coparceners in that property, and his self-acquired property free from those rights. The course of succession would not be the same for the family and the separate estate; and it is clear, therefore, that, according to the Hindu law, there need not be unity of heirship.

But to look more closely into the Hindu law. When

property belonging in common to a united Hindu family has been divided, the divided shares go in the general course of descent of separate property. Why, it may well be asked, should not the same rule apply to property which from its first acquisition has always been separate? We have seen from the passage already quoted from Macnaghten's "Hindu Law," that where a residue is left undivided upon partition, what is divided goes as separate property; what is undivided follows the family property; that which remains as it was, devolves in the old line; that which is changed and becomes separate, devolves in the new line. In other words, the law of succession follows the nature of the property and of the interest in it.

Again, there are two principles on which the rule of succession according to the Hindu law appears to depend: the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship. Most of the authorities rest the uncontested right of widows to inherit the estates of their husbands, dying separated from their kindred, on the first of these principles (1 Strange's "Hindu Law," p. 135). But some ancient authorities also invoke the other principle. Vrihaspati (3 Coleb. Dig. 458, tit. cccxcix; see also Sir William Jone's paper cited in 2 Strange's "Hindu Law," p. 250) says: "Of him whose wife is not deceased half the body survives; how should another take the property while half the body of the owner lives?" Now, if the first of these principles were the only one involved, it would not be easy to see why the widow's right of inheritance should not extend to her husband's share in an undivided estate. For it is upon this principle that she is preferred to his divided brothers in the succession to a separate estate. But it is prefectly intelligible that, upon the principle of survivorship, the right of the copareeners in an undivided estate, should over-ride the widow's right of succession, whether based upon the spiritual doctrine or upon the doctrine of survivorship. It is, therefore, on the principle of survivorship that the qualification of the widow's right established by the

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Mitakshara, whatever be its extent, must be taken to depend. If this be so, we can hardly, in a doubtful case, and in the absence of positive authority, extend the rule beyond the reasons for it. According to the principles of Hindu law, there is coparcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's life-time a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to any superior right of the coparceners in the undivided property.

Again, the theory which would restrict the preference of the coparceners over the widows to partible property is not only, as is shown above, founded upon an intelligible principle, but reconciles the law of inheritance with the law of partition. These laws, as is observed by Sir Thomas Strange, are so intimately connected that they may almost be said to be blended together; and it is surely not consistent with this position that coparceners should take separate property by descent, when they take no interest in it upon partition. We may further observe, that the views which we have thus indicated of the Hindu law is not only, as we have shown, most consistent with its principles, but is also most consistent with convenience.

A case may be put of a Hindu being a member of a united family having common property, and being himself possessed also of separate property. He may be desirous to provide for his widow and daughters by means of the separate property, and yet wish to keep the family estate undivided. But if the rule contended for were to prevail, he could not effect his first object without insisting on the partition, which, *ex hypothesi*, he is anxious to avoid.

The case standing thus upon principle, we proceed to, consider the opinions of the Pandits and the authorities referred to by them.

The case appears to have been referred to the Pandits on several occasions. The first of these references was made by the *Zilla* Court in 1833, in the suit No. 4 of 1832. The answer of the Pandits bears date the 28th of October in that year. It is unnecessary, however, to examine this particularly, since whatever is there laid down is included in the fuller statements which will be next considered.

These fuller statements were made by the same Pandits in answer to references directed by the *Sudder* Court before making the decree of the 17th of April, 1837 (*a*). The answers are dated the 28th of December, 1836, and the 16th of January, 1837.

On examining the reasons on which the Pandits rest their opinions, it is to be observed that they proceed upon the assumption that the texts cited by them apply to the case which they were called upon to consider. They seem to have done so, both as to the passages cited from Vrihaspati and as to the text in the Mitakshara to which they refer; but they leave untouched the question which they ought to have considered, whether these authorities do or do not affect this particular case. What we have already said as to the text from the Mitakshara, and what we shall presently say as to the passages from Vrihaspati is, we think, a sufficient answer to this part of the reasons on which the Pandits found their opinion. Then, again, they point to the distinction between obstructed and non-obstructed heritage; and because the widow's right is not mentioned as obstructing the heritage, they infer that she cannot be entitled.

But the whole of this last argument seems to be founded on the passages in the Mitakshara contained in clauses 2 and 3 of section I, chapter I; and these passages, when examined, clearly appear to be mere definitions of "obstructed" and "non-obstructed heritage," and to have no bearing upon the relative rights of those who take in default of male issue. If, indeed,

(*a*) See questions and answers, 3 Moo. I. App. Cas. 282.

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the argument which the Pandits have raised upon these passages be well founded, it would, as it seems, prevent the widow from taking in any case.

It remains, then, to consider the authorities on which the Pundits rely in support of their opinions. They consist of the text from the Mitakshara, to which we have already so frequently referred, and of passages from Vrihaspati and several other commentators on the Hindu law. We have already intimated our opinion that the text from the Mitakshara does not apply to this case, and as to the passages from the commentators they are all of equivocal import. They may, or may not, have been intended to apply to a case like the present, and if there was nothing more to be found upon the subject they might or might not be thought sufficient to warrant the opinion which the Pandits have founded upon them; but these passages seem to be the same passages, or passages similar to those, which were brought forward before the time of the Mitakshara, to show that widows were not entitled even where the property was wholly separate. We may instance the passage from Narada. These authorities failed when contrasted with conflicting passages in the works of other commentators, of which the Pandits in this case have taken no notice, to negative the right of the widow where the property was wholly separate; and as they have failed to this extent, we cannot but think that the Pandits in this case have gone much too far in bringing them forward as uncontradicted authorities in favour of the opinion which they have formed that the widows are not, in this case, entitled to the separately acquired property. It seems to us, too, that the decision in the *Sandayar case*—a decision also founded on the opinion of the Pundits of the *Sudder* Court—is wholly at variance with the opinion of the Pandits in the present case. Whether the Pandits in that case were or were not right in the opinion, that the *Zemindary* became the separate property of the uncle by the transaction between him and his nephew, it is quite unnecessary to consider. All that is important to be considered is, that holding the *Zemindary* to have become the separate property of the uncle, they held that the widows of the uncle's son became entitled to it, and that the Court followed that

opinion. The Pandits, in the present case, attempt to reconcile the conclusions at which they have arrived with the opinion given by the Pandits in the *Sandayar case*, by assuming that the Pandits in that case proceeded upon an idea that the descendants of the common ancestor had been separated, but we see no foundation whatever for that assumption. On the contrary the facts of the case seem to us to negative it. If, indeed, there had been any such separation, we do not see how there could have been any question as to the rights of the widows.

The case, therefore, stands thus upon the authorities. On the one hand, we have the opinions of the Pandits in this case, which seem never to have been acted upon by any final decree. On the other hand we have the decision in the *Sandayar case*, and the other authorities cited for the appellant at the Bar, particularly the passage from Menu, in Sir William Jones's, paper, given at Strange's "Hindu Law" Vol. II, p. 250 [2nd Edit.], and the opinion of the Pandit, Kristnamachary, (2 Strange's "Hindu Law," p. 231), the latter and material portion of which is not open to the objection taken to the passage which precedes it by Messrs. Colebrooke and Dorin.

In this state of things their Lordships cannot but come to the conclusion that the balance of authority, as well as the weight of principle, is in favour of the appellant's contention.

We proceed, then, to consider how the *Sudder* Court ought to have dealt with this case after Anga Mootoo Natchiar's death, and we are of opinion that that Court ought upon the applications made by the different parties claiming to prosecute the appeal, to have determined which of the parties was so entitled. We are of opinion, that Sowmia Natchiar and the grandson were not so entitled, and that their claims, therefore, ought at once to have been dismised. The claims of the appellant and her two sisters were founded on a right common to them as against the Respondent; and we think that the Court ought to have held them entitled to prosecute the appeal without prejudice to their rights *inter se*, founded upon the agreement which appears to have been entered into between them. It would then have been open to the Court to decide the case upon the merits; and upon the merits we are of opinion, for the reasons above given that the appellant and her sisters were well entitled to the

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Zemindary, as against the respondent. We have, of course, not failed to consider the judgment of this Committee in 1844. Nor have we failed to observe that, in a recent edition of his Treatise on the Hindu Law of Inheritance, Mr. Strange, one of the Judges of the *Sudder* Court of Madras has expressed an opinion adverse to the conclusion at which we have arrived. But we think it probable that the case was not so fully discussed and examined in 1844, as it has been on the present hearing; and, at all events, we do not feel ourselves justified in holding the appellant bound by the opinion which was then expressed; which, though of course entitled to the greatest possible respect, was not necessary to the decision then arrived at. And, as to the opinion expressed by Mr. Strange, it seems to rest upon the opinions of the Pandits, and the proceedings of the Courts which we have now been called upon to review. If that opinion had been supported by a uniform course of decisions, we should perhaps have felt some difficulty in contravening it; but as the case stands upon the authorities, we feel bound to give effect to the conclusion at which we have arrived.

We shall, therefore, humbly recommend Her Majesty to reverse the decrees and orders complained of by this appeal; to declare that the suit of 1856, which appears to us to have resulted from erroneous directions given by the *Sudder* Court, ought to have been, and ought to be, dismissed; and in the suit of 1845 to declare that Sowmia Natchiar and Mootoo Vadooga were not, nor was either of them, but that the appellant and her sisters were, as against the respondent, entitled to prosecute the appeal, to recover the *Zemindary*—this declaration to be without prejudice to the rights of the appellant and her sisters *inter se*; and, further, to declare that an account ought to have been and ought to be directed of the rents and profits of the *Zemindary* received by the respondent, or by his order, or for his use, since the death of Anga Mootoo Natchiar, with directions for payment to the parties entitled of what should be found due upon the account; and also to declare that the *Zemindary* ought at once to be put into the hands of the Collector, or of a Receiver to be appointed by the Court, with liberty to the appellant and her sisters, or any of them, to apply to the Court as they may be advised. We shall further recommend that the

case be remitted to the *Sudder* Court, with directions to carry these declarations into effect; but we shall not recommend that any costs be given of the suit of 1856, or of this appeal or of any of the proceedings below. But any costs to which the appellant has been subjected must be refunded.

NOTE.—This case decides a number of points and is regarded as the leading authority (I) on the question of the Hindu widow's estate and the effect of a judgment obtained against her upon those who claim the estate after her death, as also (II) on the question of succession under the Mitakshara to the self-acquired property of an undivided member of a joint Hindu family.

As regards the first question it is important to bear in mind that the widow occupies a double character, one as representing the entire estate and the other as the beneficial owner of a limited interest in the estate; the answer to the question whether the reversioners would be bound by an adverse decree against the widow or whether the entire estate would pass at a sale in execution of such decree, would depend upon the nature of the suit in which the decree was made or execution issued. If the suit was simply for a personal claim against the widow, a sale of her husband's estate in execution of a decree obtained against her in the suit will pass merely the widow's qualified interest and the reversionary interest will not be bound. A decision against the widow based on a ground personal to her cannot bind the reversioner [*Baijun Dooby* v. *Brij Bhookun*, I. L. R., 1 Calc., 133; L. R, 2 I. A., 275; *Jugul Kishore* v. *Jotindro* I. L. R., 10 Calc., 985: *Braja Lal* v. *Jiban Krishna* I. L. R., 26 Calc., 285]. If however in the suit the widow acted as representing the entire estate, the fact, that the decree of dismissal made against her in the suit was based on the ground of limitation and that the Limitation Act gives to the reversioner "entitled to possession" a fresh start from the date of the widow's death, would afford no ground for holding that the decree would not be binding on the reversioners. (*Hari Nath* v. *Mothurmohun*, I. L. R., 21 Calc., 8.)

With reference to the observations made by their Lordships in the principal case on the effect of impartibility of an estate forming part of a joint family property it would be instructive to study the later pronouncements of the Judicial Committee in *Sartaj Kuari* v. *Deoraj Kuari*, I. L. R., 10 All., 272; and *Venkata Surya* v. *Court of Wards*, I. L. R., 22 Mad., 383.

GURU GOVIND SHAHA
vs.
ANUND LAL.

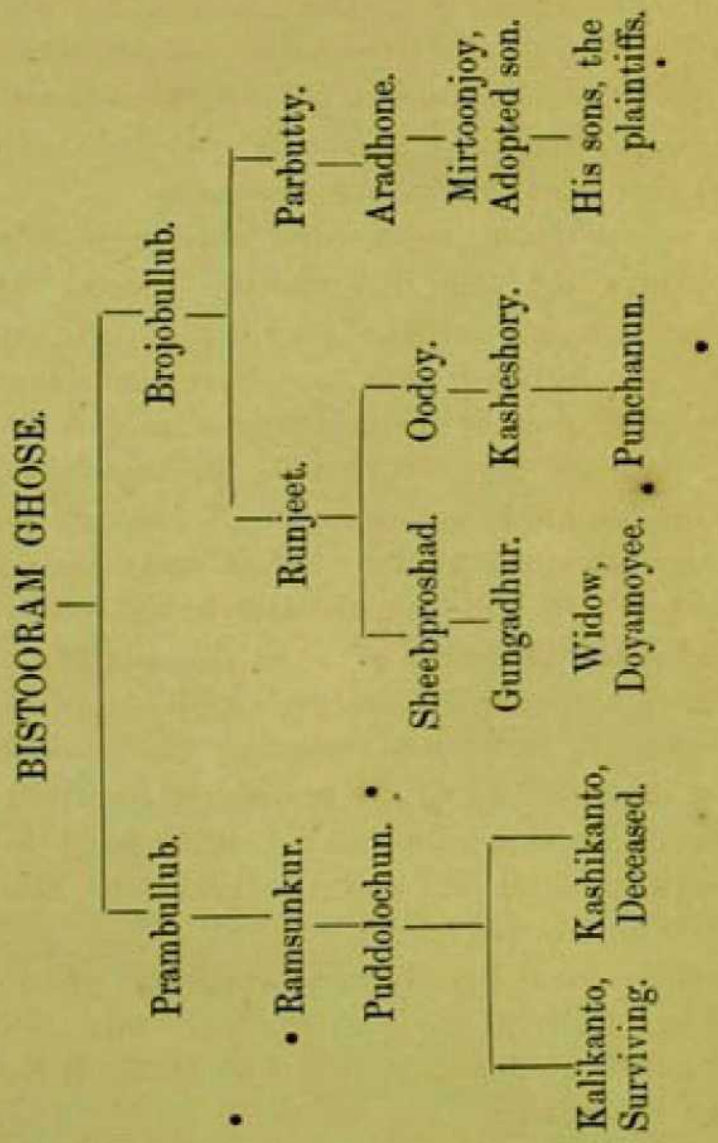
(Reported, 13 W. R. F. B. 49; 5 B. L. R. 15.)

The 24th January, 1870.

1870. January, 24.

This case was referred to the Full Bench by BAYLEY and HOBHOUSE, JJ., with the following remarks :—

HOBHOUSE, J.—The points we have to determine turn entirely upon a question of genealogy, and, with reference to those points, the following is admittedly the family tree, *viz.*,—



Present :—The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice* and the Hon'ble F. B. Kemp, A. G. Macphersen, Dwarkanath Mitter and Sir Charles Hobhouse, *Bart*, *Judges*.

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The question is whether the plaintiffs, who are the sons of the adopted son Mirtoonjoy, can, in the presence of Punchanun, sue to set aside certain alienations made to the defendants, special appellants, by one Doyamoyee out of the estate of Gungadhar deceased.

This question is again upon the arguments divided into two parts.

Firstly—Whether the plaintiffs being but descendants by adoption and being fifth in descent can take at all ; and

Secondly—Whether Punchanun, admitting that plaintiffs can take at some time or other, is not the preferential heir, inasmuch as he is admittedly in the position of a kinsman, who can offer two oblations to the deceased owner Gungadhur ; whilst on the other hand, plaintiffs are admittedly only in the position of *Sakulyas* or distant kinsmen.

These points have been very ably argued by Babu Kalee Prosunno Dutt for the defendants, special appellants, and Babu Romesh Chunder Mitter for the plaintiffs, special respondents, and we believe that we have had the whole of the authorities bearing upon the said points most fully set before us.

It is admitted by the pleader for the special appellants that, if the adopted son were in all respects on an equality with the natural son in the matter of succession, the plaintiffs, the descendants of an adopted son, in this case, would not be out of court simply because of such descent ; but it is contended that in this matter of succession the adopted son is not on such an equality, but that, whereas the descendants of the natural son are heirs up to the seventh generation, the descendants of the adopted son are, on the other hand, heirs only up to the fourth generation, and the plaintiffs, being but of the fifth generation, are not heirs.

This contention is based almost entirely upon an interpretation that is sought to be put upon certain texts and comments thereon to be found in verses 18 to 26 of Section III of the Dattaka Chandrika.

The verse mainly relied on is verse 18, and it is couched in these words—

"The relation of *Sapinda* is next considered. This extends to three degrees : in the family of the natural father by reason

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of consanguinity; and in that of the adopted, through connection by the funeral cake."

Looking to the words used and to the context, this verse seems to me to be at once a proposition laid by the commentator for consideration, and also a conclusion to which the commentator had arrived; but the question seems to me still to remain as to what the extent of the question was which the proposition was intended to embrace and to conclude.

A text to support the preposition is given in verse 19; then in the verses 20 to 23 are given the explanation and the bearing of that text, and the reconcilement of it with apparently inconsistent texts; then in verse 24, the proposition is again laid down almost *verbatim* as in verse 18, as proceeding from some other commentator; and then again in verses 25 and 26 are given a further explanation and further bearing of the text.

I can not but conclude from the best consideration I can give to this section III as a whole that the commentator intended to lay down the proposition that, whilst in the case of the natural son, the relationship of *Sapinda* extended to the seventh degree, in the case of the adopted son that relationship extended only to the fourth degree.

I remark that in the previous part of the section, he had been treating of two classes of adopted sons, and of the *Status* of these two classes *quoad* one another and the natural sons; and that, just before the introduction of the proposition in v. 18, he had been drawing a comparison between the *dwyamusyana*, or the son of two fathers, and the absolutely adopted son.

He then came naturally to consider these two classes of adopted sons in the relationship of *Sapinda*, and thus the proposition which follows is made to embrace, as undoubtedly it does embrace, both classes.

He then gives the text and shows (v. 20) how it applies in both parts only to the son of the two fathers, explaining how he alone takes in six generations, three of the natural and three of the adoptive father (and so v. 25), and in one part only to the absolutely adopted son, showing he takes in three

generations upwards, *viz.*, to the adoptive father, grand father, and great grand father.

Then follows an illustration showing that the taking of the adopted son extends only to three generations, *viz.*, in the case of the grand-son by association with the adopted son, the adopter, and the adopter's adoptive father (v. 21).

And lastly, he says, the fourth generation of the adopted sons is excluded, because the adopted son, differing from the natural son, is precluded, from partaking of the wipings of the oblations (v. 22), 'and thus the general relation of *Sapinda* extending to the seventh degree which is propounded in the 'Mutsya Purâna' in a text (which) be quotes, is barred by the special rule in question," *i.e.*, by the special rule he is propounding (v. 18 and 24)—the relationship of *Sapinda* "which might be inferred from analogy to the real legitimate son" being not only not established, but prohibited (v. 26).

I think, therefore, that on the authority of the Dattaka Chandrika, on which both parties through their pleaders rely, it must be held that the adopted son is not a *Sapinda* beyond the fourth generation, and if not a *sapinda*, then no relative at all after that generation.

It is then contended by the pleader for the special appellants that when the adopted son, as in this case, is thus shown not to be any relative at all beyond the fourth generation, he cannot be an heir; because, under the Hindu system, heirship is dependant on relationship; *i.e.*, on the ability to offer funeral cakes, the wipings, water, and other solemnities by reason of association with generations up or down the family tree.

Looking to the general foundation on which I shall afterwards have occasion to say that I think succession in the Hindu family is based, and to the special reasons given as the foundation of the particular system of adoption, it is quite clear to me that as a general rule, relationship is the foundation of the system of succession, and that the particular system of adoption follows this doctrine, adoption being declared to be for the sake of the funeral cakes, water, and solemnities (v. 3, Sec. 1); and arguing from the foundation of the systems, I should be inclined to hold that when relationship ceases,

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then the right of succession must fail; but, on the other hand. I think that if it should be found that under the practice of the system of adoption as described in the Dattaka and other authorities, adopted sons may succeed to the inheritance whilst yet they cannot perform obsequies; and if this practice has justice and equity and the fitness of things to support it, I think it will be our duty to uphold it. I will, therefore, give the best consideration I can to the authorities submitted to us, and will endeavour to discover whether or not there is in these authorities any declaration of a right or practice of inheritance in the adopted son independent of, and beyond, the time when he ceases to be a relative.

Now, I think in the first place that it must be admitted that the provisions of Section III of the Dattaka apply to the adopted son *quoad* the performance of funeral rites, and these only. Section I expressly says, "next the funeral rites performed by son given are determined." And though verse 18 does in one sense open out a new subject in the words "the relation of *Sapinda* is next considered," yet it is quite certain that in the following verses of the section that relationship is considered in connection with funeral rites, and not otherwise—verses 21, 22, 23 and 26 expressly referring to one or more of those rites.

Then setting aside the division of the Dattaka Chandrika into chapters as a division made only for convenience sake by the learned editor of the work, we still find that the author himself treats the question of Sapindaship in direct connection with the question of funeral rites on the one hand, and the cognate question of the "impurity of the adopted son" on the other hand, and that it is not until these questions have been entirely disposed of, that the subject of the inheritance of the adopted son is commenced upon,—a new subject being evidently in the mind of the commentator himself when in Section V. "on succession by inheritance" he commences with these words: "The inheritance of the adopted son is *next* propounded."—Verse 1, Section V.

It may, then, I think, safely be said that Section V, taken as a whole, may be regarded in this light. Verses 1 to 18 inclusive may be said, I think, simply to give various conflicting

opinions of writers on the subject of the succession of the adopted son, a word of explanation being put in here and there in illustrations of some particular text.

In verse 19, the commentator may be said to be endeavouring to reconcile the conflicting texts he has quoted. Then in verse 20 he quotes what is evidently to his mind the ruling text from Menu.

In verses 21 and 22 he refers again to certain other conflicting texts, and in verses 23 and 24 he seems to me to give that conclusion of his own, by which, as he is the ruling authority, we are bound.

"Of the man (Menu says, verse 20) to whom a son has been given adorned with every quality, that son shall take the heritage."

Then the commentator explains that it is by reference to this expression "adorned with every quality" that seeming contradictions of various writers are reconcilable, and he concludes in v. 24 thus: "Therefore, by the same relationship of brother, and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman, where such son may not exist, the adopted son takes the whole estate even."

I think myself that this last passage is not only conclusive on the point before us, but that it is in consonance with the tenor of such texts as I have been able to collate from the great lawgiver Menu, with the whole polity of the system of adoption, with the opinions of men learned in the matter, with the tenor of the decisions of the Courts, and with the principles of justice and equity.

In chapter IX, Institutes of Menu, verses 158 to 160, I find that of the twelve sons named by Menu, six are kinsmen and heirs, and that "a son given" is mentioned as one of those who is of the number "of the six kinsmen and heirs," and heirs not to their own adoptive fathers only, but to collaterals also.

In the Dattaka Chandrika, v. 1, sections III, I find a text which seems to say that, except in the event of the subsequent birth of a legitimate son, "the adopted son in every respect" (and this would seem to throw a doubt even on the extent of the *sapinda* relationship *quoad* funeral rites) resembles the real legitimate one.

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Again, in Note 20, page 227 of the same authority, I find the learned commentator on this authority maintaining the opinion that the restriction to the third generation of the adopted son refers, not to succession to collaterals, but to funeral rites and the like only.

Again, as indicating the polity of the system of adoption, I find that, after adoption, the adopted son resembles in every respect the natural son; that the filial relationship in the absolutely adopted son (which is the case before us) with the natural family both as regards succession and family ties and duties, has entirely ceased; and that, in fact, he has ceased to be a member of his natural family, and is incorporated, as if he were a blood relation unable to intermarry, with his adopting family (Dat. Chand., verses 18 and 19, section II; verse I, section III; verse 7, section IV; Macnaghten, Volume, I, pp. 6 and 70).

And so the decisions of the Courts. The adopted son it has been held, succeeds both lineally and callaterally and the reason is that he becomes for all purposes, the son of the (adoptive) father. (Privy Council, p. 25, Sutherland 6th February, 1835). There being no son of the body, the adopted son "represents his adoptive father, and is entitled to the share which his father would have obtained." (W. R., pp. 423-25). "An adopted son has all the rights and privileges of a son born", succeeding as a son of the body would "to the *Streedhun* of his adoptive mother." (3 W. R. pp. 49, 50).

And so the equity and justice of the case; for when the adopted son we are discussing is debarred, by reason of adoption, from ever claiming either in himself or in his heirs any portion of the estate of his natural father (verses 18 and 19, section II, Dat. Chand., and Macnaghten, Vol. 1, p. 69 &c.) it is obvious that justice demands that to the same degree that he was heir to his natural father, to that degree he should be heir to his adoptive father.

On a careful review, therefore, of the authorities, I would give the first issue in favor of the special respondents.

I addess myself to the second question that is before us, and here I find myself at issue with opinions given by no less

than six Judges of this Court and amongst these Judges, by our late colleague, Mr. Justice Shumbhoonath Pandit.

I need hardly say with what hesitation and unwillingness I have arrived at an opinion different from that of these learned Judges, and especially, on such a point, from that of the late Mr. Justice Pandit, and but that my learned colleague, Mr. Justice Bayley shares this difference of opinion, I believe I should myself have waived it in deference to the other opinions I have alluded to.

But, as it is, the subject is so important and involves a question so vital to the Hindu family life, that Mr. Justice Bayley and I are agreed that it is our duty to submit our own judgments upon it for the consideration and determination of a Full Bench.

I propose to consider, first, the various decisions of this Court that are adverse to our view, and then the text of various recognised authorities upon the subject.

The first reported case is that which is to be found in Marshal, page 398, and though it is not very clearly stated in the preamble, the question there seems to have been whether the father's brother's daughter's son or the son of a son's son was the preferential heir.

The learned Judges (Seton-Karr and Campbell, JJ.), maintaining a judgment of the learned Judge (Jackson J.) of Rajshahye, held that the son of a son's son was to be preferred.

The grounds on which the learned Judges based their decision seem to me to have been shortly these. They considered that in Hindu Law, the succession through females was quite exceptional; that the Hindu Law, like that of ancient Rome, was, in its regulation of descent, agnatic; that most relations through females were excluded; that the succession of the daughter or the daughter's son was an anomaly; that whilst the Benares School was against succession of this nature, the authorities of the Bengal School were not consistent nor unanimous in admitting them; that the presumption, therefore, was against the succession of the son of a daughter; and that the presumption had not been rebutted by any sufficient authority, or established practice shown.

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Virtually the learned Judges held in this case that the brother's daughter's son was *excluded* from the inheritance and the main principle on which they based their decision was (as they held) that doctrine of the Hindu system of succession by which succession through a female was quite exceptional.

It seems to me, after the best consideration I can give to the received authorities, that the principle relied on cannot in any sense be held to be a principle which at all regulates the Hindu Law of succession.

A single glance at the table of succession in the Dyacrama Sangraha shews that out of the 42 enumerated kinsmen who are heirs, there are no less than 5, who, being females, are *mentioned as direct heirs*, and no less than 10, who, being males, are mentioned as taking through females, *i.e.*, a proportion of 15 out of 42 enumerated heirs are themselves females or taken directly through females.

And, again, as I hope to show hereafter, the question of sex has only, it seems to me, if it has any bearing at all, the most indirect bearing upon the system of the Hindu succession, but rather that system is based, not upon any question of this or that sex, but upon the religious foundation of oblations. For instance, daughters having or likely to have issue succeed, because they confer benefits on the deceased owner by presenting to him, through their sons, funeral oblations at solemn obsequies (v. 4, section III, chapter I, Dyacrama Sangraha). But, on the other hand, daughters who are barren, or widows destitute of male issue, are incompetent to succeed, because they cannot benefit the deceased owner through the medium of sons by offering the above oblations (v. 5, sec. III).

So, in my judgment, it is not, as a rule, the sex of the parent, but the competency of the particular person whose case is being considered to offer or not to offer funeral oblations to the deceased owner that is the test of heirship. It is not, in short, to apply the doctrine to this case, because he is the brother's *daughter's* son, but because *he can or cannot offer oblations* to the deceased, that the brother's daughter's son is or is not an heir.

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Seeing, therefore, that the judgment of which I have been speaking was, as it seems to me, based on a misconception of the main principle which governs the Hindu Law of Succession, I cannot subscribe to that judgment ; and as it is obvious that the judgment in No. 457 of 1864, 17th August, 1864, Chintamoni Bose and another (special appellants), and No. 92 of 1868, 17th December, 1868, Rajdoolall Sircar (special appellant) simply followed without any discussion, the ruling to be found at page 176, Sutherland's Special Full Bench, Number, I shall proceed at once to consider that ruling.

That ruling is, no doubt, directly in point, and the learned Judges (Norman, Offg. Chief Justice and Kemp and Pandit, JJ.) distinctly held that a brother's daughter's son was excluded from the succession.

The judgment concisely stated seems to me to have proceeded on these considerations, *viz.*, that the father's brother's daughter's son *was not enumerated* in the Dyabhaga in the order of heirs ; that the text in the Dyacrama Sungraha in which such son was enumerated, which was the text on which every learned writer of modern times had relied, was an *interpolation ;* and that, inasmuch as these facts were so, therefore, the brother's daughter's son, whatever might be the consequences to the Hindu family, must be held excluded.

As I have said before, with such authorities against me I have hardly been able to persuade myself that I ought to maintain a different opinion, but the more I have consulted the original text books, and have considered what I conceive to be the basis of the system of the Hindu Law of Succession, the more convined I am that the position taken up by the learned Judges is as assailable at law, as it is, by their own admission, assailable on the principle, which, as a rule, governs the Hindu family life.

I doubt, first of all, whether the fact (and it is admittedly a fact) that the father's brother's daughter's son is not enumerated in express terms in the Dyabhaga as amongst the heirs, of necessity excludes him, and I observe that, under the cognate system of the Mitakshara, the absence of such enumeration does not exclude—(see pp. 36, 37, Part II, Vol. II, B. L. R.) (1).

(1) 10 W. R., F. B., 76.

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I would, then, first observe that the brother's daughter's son is not one of those enumerated as persons excluded from the inheritance (see chapter III of the Dyacrama and Chapter V of the Dyabhaga; and if not excluded, then is he not included.

But more than that, I observe that Chapter V of the Dyabhaga on "exclusion from the inheritance" was written with an express purpose, and that purpose is declared as well in the closing as in the opening part of the chapter as follows:—

"In the next place persons incompetent to inherit specified" (why?) "*for the purpose of making known, by the exception, competent heirs.*"—verse 5, Chapter V, p. 101.

Then the author describes who are incompetent heirs and the foundation of such incompetency, and concludes (verse, 20) ——"*Thus it has been explained who are persons incompetent to inherit.*"

Then, taking the chapter as a whole, the foundation of incompetency is, it seems to me, the inability from one cause, or another to perform funeral obsequies, and on the other hand, the right to inherit is expressly declared to be the reward of benefits conferred (v. 6), and if I am right in my reading of this chapter two propositions seem to me to follow:—

First—That every one is competent to inherit who is not by this chapter declared incompetent; and

Secondly—That every one who can present funeral obsequies is competent to inherit.

And in the face of this chapter on exclusions and the declared purpose of it, it cannot, I think, be logically said that, in the subsequent chapter "in regard to succession (chapter XI), the author of the Dyabhaga intended to exclude from the inheritance all those persons whom he does not expressly enumerate; neither will the chapter itself, I think, on a careful examination, bear any such construction.

In the first place, there are passages in the chapter in which the enumeration is expressly not complete, as for instance in v. 13, Sec. III, p. 216, where the author speaks "of the maternal uncle *and the rest.*"

Then the recapitulation by Sreekrishna in p. 224 is clearly

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not complete, for the same author in the Dyacrama Sangraha, as may be seen by a comparison of his recapitulation here with the succession-table there omits in the recapitulation many heirs who appear in his treatise and the table drawn therefrom.

And, then, the whole foundation of succession, as laid down in this chapter, repeatedly requires many persons to be enumerated as heirs who are yet not so enumerated; and I remark that the learned author of the Byabastha Durpan affirms that there are 31 such heirs omitted in the Dyabhaga, but enumerated in other commentaries of equal or superior acceptance (p. 280, Byabastha, edition of 1857).

The great principle on which, I think, we can gather that the law of succession, as detailed in this Chapter of the Dyabhaga, proceeds, is that which I have already quoted; and it is this, namely, that the right to inherit is the reward of spiritual benefits conferred on the deceased owner of the property, and that the order of the procession of inheritance depends, as a rule, upon the extent of those benefits.

Thus, we have the oft-repeated text of Menu as governing the whole system "to three, must oblations of water be made; to three must oblations of food be presented" (pp. 214-215), applied to heirs up to the 5th degree; and, to take the case nearer home to the point before us, we have the brother succeeding by reason that he offers three oblations (v. 3, Chap. XI, p. 199); the brother's sons and grandsons preferred to the paternal uncle), because they present nearer oblations (verses 5 and 6, p. 142); and the brother's great-grand son rejected, as too remote, because he is not a giver of oblations (v. 7, Chap. XI, p. 214).

And, though it is true that we do not find the father's brother's sister's son, as many other such like kinsmen enumerated by Sreekrishna in his recapitulation, yet we do find this general principle that I have here alluded to broadly and distinctly laid down in these terms, namely, that it is only "on failure of all such kindred who present oblation in which the deceased owner may participate that the succession devolves on the maternal uncle and the rest" who present lesser oblations, and long after them on the *sakulya* or distant kindred (p. 225).

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My judgment, then, is that the absence of any express mention of the father's brother's daughter's son in the enumeration of heirs in Chap. XI of the Dyabhaga is no sufficient reason for holding that such son is not an heir; and I will go further and say that, in my judgment, the absence of any mention of such son in the enumeration of excluded persons in Chap. V and that the declaration, if I am right, of that great principle on which succession is based (a principle by which the son in question as presenting two oblations is manifestly entitled to the inheritance) throws the *onus* on the other side to show why the said son should be excluded.

I return, however, to the judgment I am discussing and have only now to consider that part of it which bases the exclusion of the father's brother's daughter's son on the assumed interpolation of the text in the Dyacrama Sungraha by which the said son is expressly included in the inheritance.

I quote underneath the verses (1, 2, 3, Sec. X, Dyacrama Sungraha) including that verse (2) in which the interpolation is said to occur, and I contend, *first* of all, that, to my mind it is very doubtful whether verse 2 is an interpolation at all; and, *secondly*, that, if it is so, the fact is not conclusive of the law.

Verse 1.—"On failure of the brother's grandson, the succession goes to the father's daughter's son, for he presents three funeral oblations, namely, to the father, paternal grand-father, and paternal great-grand-father of the deceased owner, *i.e.*, to his own maternal grand-father, maternal great-grand-father, and maternal great-great-grand-father. (According to Acharyya Chundamani, the son of the proprietor's own sister, and the son of his half-sister, have an equal right of inheritance.)"

Verse 2—"In default of the father's daughter's sons, the brother's daughter's son succeeds, for he presents two funeral cakes in which the deceased owner participates, namely, to his (the owner's) father, and paternal grand-father."

Verse 3—"Failing him, the paternal grand-father is the successor, for as the father is entitled to succeeded on a failure of the heirs of the deceas owner ending with the daughter's son, so by the rule of analogy the succession devolves on the grand-father in default of heirs down to the father's

daughter's son ; and because he presents one oblation (namely, to the owner's paternal great-grand-father, *i.e.*, his own father) in which the deceased owner participates".

Now, on considering the wording of the verses I have quoted, and generally of the verses in this treatise speaking in detail of the order of succession, it will be found that each verse naturally divides itself into two parts : the *first* declaratory of the law ; the *second* explanatory of the ground on which that law is founded.

Thus verse 1—"On failure of the brother's grand-son the succession goes to the father's daughter's son." This is declaratory of the law, and is the first part of the verse.

"For he presents three funeral oblations, &c." This is explanatory of the ground on which the law is founded, and is the second part of the verse.

And so in verse 2, it is first declared that, failing the father's daughter's son, the brother's daughter's son succeeds, because, it is explained, he presents two funeral cakes.

And so in verse 3, it is declared that failing the brother's daughter's son, the paternal grand-father succeeds, because it is explained "of the analogy between him and the father, and because he presents one oblation."

It is in the words descriptive of the analogy that the difficulty of the passage in verse 3 consists ; but if I am right in disconnecting the declaratory from the explanatory part of the verse, that difficulty seems to me to disappear, because, whether the explanations be good or bad, consistent or inconsistent, they are still nothing more than explanations, and they are at the least explanations quite consistent with that policy on which, if I am right, succession proceeds—the policy which makes succession depend as a general rule, upon the number of oblations that can be presented, and which would, therefore, when applied to the case before us, prefer the father's brother's daughter's son, as presenting two oblations, to the paternal grand-father, as presenting only one oblation.

Then, on considering the succession in verse 3 with those successions which precede and those that follow it, and with other similar successions declared in the table of the Dyacrama

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Sungraha, it is at once manifest that the succession declared in verse 2 is not only in its exactly appropriate place, but is in perfect harmony with the whole table of succession. Omit it indeed, and there would be discord and inconsistency.

It not only succeeds verse 1 because of the presentation of only two oblations, and for that same reason precedes verse 3, but it chimes in exactly with those subsequent successions numbered 19 and 20, and 26, and 27, in the table, about which there is no dispute.

It is said, however, that this fact indicates only the ingenuity of the interpolation, but on this I would remark that on such reasoning you might argue away successions 19 and 20, and 26 and 27 also, and indeed would arrive at that *reductio ad absurdum*, by which you would be obliged to hold that the greater the fitness of a text in any work, the more certain the interpolation.

It is then said that the passage is admittedly an interpolation, and a *Byabastha* to be found at p. 77, vol. II, Macnaghten is relied on; but here again, the answer is that it is only wanting in some and not in all copies of the Dyacrama Sungraha; that we have no direct, nor, as I would contend, any indirect evidence of interpolation; that we do not know that the verse, even if an interpolation does no yet declare what has been the recognized law for years; and that at least, this we do know that such an authority as Macnaghten, with his eyes open to this alleged interpolation, did yet determine to recognize the same as a part of the true text.—Macnaghten, p. 31, Vol. I.

Again in considering the words used in the verse descriptive of the analogy it should not be forgotten that the analogy between the father and grand-father is not a complete analogy; that whereas in the one case it descends and ascends lineally, in the other it first branches off to the mother, then again to the brother and his son and grand-son, and then again to the father's daughter's son; and if reason, which we are told is to guide us where texts and commentators differ in matters of Hindu Law, is to be followed, then we should undoubtedly expect the father's brother's daughter's son to intervene

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exactly where the alleged interpolated verse would make him intervene in the order of succession.

To the best of my judgment, then I cannot say that the verse in question is an interpolation; for, to sum up, if it be true that it is wanting in some copies of the original, it is still present in others; it is not irreconcilable in itself or with its context; it occurs in its appropriate place; it has been deliberately accepted by a great authority (Macnaghten); and it is perfectly in harmony with what I conceive to be the basis on which the Hindu system of succession and the Hindu family, as an institution is founded.

But even if it be conceded that this particular verse be an interpolation, still the Hindu system of succession on which the text is based does to my mind remain declared and accepted, and is thoroughly in accordance with the interpolation.

During the life time of parents the heirs are not entitled to the inheritance, because they do not confer any spiritual benefits on the deceased.—Sec. I, verse 4, chapter I, Dyacram Sungraha.

The daughter succeeds because through her son she presents oblations to the father.—Sec. 3, verse 4, chapter I, *ib.*

The daughter's son succeeds, because he offers such oblations—Sec. IV, verse 1, Chap. I, *ib.*

The mother succeeds, because she gives birth to those who offer such oblations—Sec. VI, verse 2, chapter I, *ib.*

The grand-father's daughter's son succeeds, because he presents two oblations, and so the uncle's daughter's son and the paternal grand-father's daughter's son—Sec. X, verses, 8, 9, 13, chapter I, *ib.*

And it is not until failure of the heirs who present oblations in which the deceased owner participates that the remote kinsmen (*sakulyas*) take—Sec. X, verse 21, chap. I, *ib.*

Thus far the Dyacrama Sungraha, and in like manner the Dyabhaga, but the particulars are even more precisely given in the latter.

The kinsmen, *sapindas* generally first take, and not till after them the *sakulyas* or distant kinsmen—Chap. XI, verse 5, page 160, and verses 37 to 40, pages 171 and 172.

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The nearer the oblation, the greater the preference.—Verses 5 and 6, Chap. XI, page 214.

The brother's great-grand-son does not succeed as a *sapinda*, because, being in the 5th degree, he is not a giver of oblations.—Verse 7, Chap. XI, page 214.

According to Menu, or "To these must oblations be made and these first take; to the nearest kinsmen (*sapinda*) the inheritance next belongs; and not until failure of these to the distant kinsmen (*Sakulya or Samanodaka*) come in.—Verses 10, 13, 15, Chap. XI, pages 215, 216, 217.

And Verse 17, Sec. VI, page 217, is particularly positive, declaring, on the authority of Menu, that "the fifth in descent not being connected by a single oblation, *is not an heir*, so long as a person connected by a single oblation, whether sprung from the father or the mother's family exists."

And nearness of kin depends, not on birth, but "on superiority of benefits by presentation of oblations," (verse 18); therefore such a kinsman is a preferential heir (verse 19). And it is only after such that the *sakulyas* come in (verse 21, pages 218, 219).

The rule including all kinsmen (verses 28, 31, Chap. XI, pages 221, 222).

And, finally, in the recapitulation of the passage I have already quoted, "*on failure of all such kindred* (as those) *who present oblations in which the deceased owner may participate*," the succession devolves first on those who present lesser oblations, and finally on *sakulyas* (page 225).

And so Colebrooke's Digest, Volume IV, pages 159, 175, 181, 190, 226, 228 and 234.

Excluding, then the supposed interpolated verse, I still find that, on the authorities quoted, the father's brother's daughter's son is included in the succession, and I would answer the second issue before us in the defendant special appellant's favour, and would dismiss the plaintiff's suit with costs.

But this must be dependent on the decision of the Full Bench—the question to be submitted to them being this, *viz.*,

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whether a father's brother's daughter's son is or is not included in the succession by the Bengal School of Hindu Law.

Bayley, J.—I concur in the reference to the Full Bench for the reasons stated in the above judgment.

The following are the judgments of the Full Bench :—

Mitter, J.—The question which we are required to determine in this case, is whether under the Hindu law current in the Bengal School, the son of a paternal uncle's daughter is entitled to succeed to the estate of a deceased Hindu, if no nearer heirs are forthcoming.

The solution of this question depends upon the true construction of the Dayabhaga, a treatise on the Hindu Law of Inheritance by Jimuta Vahana, the acknowledged founder and chief of the Bengal School. The other authorities current in that School, such as the Dayacrama Sungraha of Sree Kishen Turkolunkar, the Duyattwa of Roghoo Nundun, and the Vivada Bhungarnub of Juggurnath Turko-Punchanun are all of them almost exclusively founded on the Dayabhaga; and such difference of opinion as there is between them and the fundamental treatise is entirely confined to a few cases of detail which involve no conflict of principle of any kind whatever.

Such then being the state of our authorities, it is necessary first of all to ascertain whether the Dayabhaga itself is founded on any general doctrine or principle which will enable us to arrive at a satisfactory conclusion on the point now under our consideration. We are of opinion that there is such a principle, and that it is no other than that of spiritual benefit.

That the Hindu Law of Inheritance, in the widest acceptation of the term, is essentially based upon considerations relating to the spiritual welfare of the deceased proprietor, is a proposition beyond all dispute. All the ancient *Rishees* or Hindu sages whose texts are regarded as the fundamental source of that law, and all the commentators on it whose opinions are recognized as authorities in the different schools current in the country, are unanimously agreed in accepting these considerations as their chief, if not as their exclusive, guide. The author of the Dayabhaga is no exception to the

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rule. On the contrary, he is clearly and expressly of opinion, as we will presently show, that the whole theory of inheritance is founded upon the principle of spiritual benefit, and that it is by that principle, and that principle alone, that every question relating to it must be determined.

It is to be borne in mind that the Mitakshara, or rather the Benares School of Hindu Law, was the dominant school in Bengal when the Dayabhaga was written, and that some of the lawyers of that school were of opinion that the word *sapinda* as used by Menu indicates mere consanguinity, and not the power of conferring spiritual benefit. The author of the Dayabhaga, as the founder of a new school, expressly repudiates this doctrine, by declaring that the nearness of kin indicated by Menu *is absolutely dependant on the presentation of offerings.* "Nor should it be pretended," he says (Colebrooke's Dayabhaga, verse 18, Section VI, Chapter XI), "that the text of Menu 'to the nearest *sapinda* male or female, inheritance belongs' is intended to indicate nearness of kin according to the order of birth, and not according to the presentation of offerings; for the order of birth is not suggested by the text. But Menu, declaring that oblations of food, as well as libations of water, are to be offered to three persons, and that the fourth in descent is a giver of oblations, but neither is the fifth in ascent a receiver of offerings nor is the fifth in descent a giver of them, thus *declares nearness of kin, and shows that it depends on superiority* of (benefits by) presentation of oblations." We shall have occasion hereafter to comment at length upon the text of Menu referred to in this verse; but what we wish to be particularly borne in mind for the present is that according to that text, as interpreted by the author of the Dayabhaga, the nearest heir is he who is competent to confer the greatest amount of spiritual benefit on the soul of the deceased proprietor. "It is by wealth," he says in verse 13 of the same section, "that a person becomes a giver of oblations." "Two motives" he continues in the same verse, "are indeed declared for the acquisition of wealth,—one temporal enjoyment, the other the spiritual benefit of alms, and so forth. Now, since the acquirer is dead and cannot have temporal enjoyment, *it is right that his wealth should be applied to his spiritual benefit.*" Then again, in

verse 29 of the same section, he says "inheritance is in right of benefits conferred, and the order of succession is regulated by the degree of benefit ;" and the same principle is laid down still more clearly and emphatically in the preceding verse, which says :—"Therefore such order of succession *must be followed* as will render the wealth of the deceased *most serviceable to him.*

In order to remove all reasonable doubts on a point of such capital importance, we think it necessary to make a few observations on the mode in which the principle of spiritual benefit has been actually worked out in the Dayabhaga. The work purports on the face of it to be a treatise on the partition of heritage ; but it is really divisible into two distinct branches,—one relating to the subject of partition among co-heirs, the other to the order of succession to be followed when different persons are claiming the same estate by right of inheritance. The first of these two branches has no material bearing on the point involved in the present discussion, and we will therefore confine our remarks entirely to the second.

Now, it is beyond all dispute that the whole of this portion of the Dayabaga is nothing but a mere elaboration of the doctrine of spiritual benefit. Every point for which a discussion is thought necessary is ultimately determined by that doctrine ; and it is by that doctrine that every difficulty is ultimately removed. The texts of Menu and various other Hindu sages are frequently cited, it is true, as the highest authorities on Hindu Law ; but it is by the light of the doctrine of spiritual benefit that every one of those texts is interpreted, and it is by that light that every discrepancy existing between them is reconciled.

If examples are necessary, we have only to go through the 11th Chapter of the Dayabhaga, which contains the whole law of inheritance relating to the estate of one who has left neither sons nor grand-sons, nor great-grand-sons. It will be seen that the first and most prominent characteristic of the order of succession laid down in this chapter, is the studious exclusion of female relatives generally. It is to be borne in mind that these relatives are as a class disqualified by their sex to perform the religious ceremonies prescribed by the Hindu Shastras

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for the promotion of the spiritual welfare of a deceased indivdual; and hence it is that the author of the Dayabhaga has generally excluded them from the category of heirs. The few that are allowed to come in are allowed to do so on the authority of special texts, but even in their case the doctrine of spiritual benefit is expressly put forward as the ultimate reason for the selection. Thus, for instance, the widow is no more competent than other relatives of her sex to perform the ceremony of the *Parbuna Shraddh* to which we shall have to refer more specifically hereafter; but she is nevertheless, according to the author of the Dayabhaga, "half the body of her deceased husband;" and the consequences of all her acts, whether virtuous or vicious, must be necessarily borne by his soul. It is for this reason that she is recognized as an heir, and it is by the light of that reason that the numerous conflicting texts bearing upon her case are reconciled with one another. "Since by these and other texts," he says, (Colebrooke's Dayabhaga, verse 44, Sec. I, Chapter XI), "it is declared that the wife rescues her husband from hell, and since a woman doing improper acts through indigence causes her husband to fall into a region of horror, for they share alike the fruits of virtue and vice, therefore the wealth devolving on her is *for the benefit of the former proprietor, and the wife's succession is consequently proper.*" The discussion on the question of precedence between the widow on the one side, and the son, the grand-son, and the great-grand-son on the other, is significant. If the widow is really half the body of her husband, how is it that sons, grand-sons and great-grand-sons are allowed to supersede her? The author of the Dayabhaga answers this objection by stating that the power of the widow to confer spiritual benefit commences from the date of her husband's death, whereas sons, grand-sons, and great-grand-sons, confer such benefit from the moment of their birth,—see verse 43, Section I, Chapter XI.

The next exception made is in the case of the daughter, and she is allowed to come in because she can confer great spiritual benefit on her father, by giving birth to a son who will deliver him and his ancestors from hell; and hence it

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is that those daughters who are barren or childless widows are carefully excluded from the line of inheritance. The maiden daughter is allowed to come in first, because her marriage might be delayed on account of indigence beyond the age of puberty, and the salvation of her father's soul and of those of his ancestors might be thereby jeopardised; so that even here the spiritual welfare of the deceased proprietor is distinctly recognized as the ultimate ground of the decision. The same remarks are also applicable to the mother, the grand-mother, etc., for it will be seen that in each of those cases, some peculiar spiritual benefit or other is invariably put forward as the basis of the discussion.

As to the male heirs, we may divide them for the sake of convenience into the following classes:—

(1)—*Sapindas* strictly so called, or in other words, relatives connected through the medium of undivided oblations.

(2)—*Sakulyas*, or relatives connected through the medium of divided oblations.

(3)—*Samanodocas*, or relatives connected by libations of water.

(4)—Certain specified strangers commencing with the spiritual preceptor, and ending with the learned Brahmin of the same village, leaving aside the king who is entitled to come in more by right of escheat than by that of inheritance.

Here again we find that the same principle is in operation throughout. The *sapindas* are allowed to come in before the *sakulyas* because undivided oblations are considered to be of higher spiritual value than divided ones; and the *sakulyas* are in their turn preferred to the *samanodocas* because divided oblations are considered to be more valuable than libations of water. The members of the last class are not competent, it is true, to offer either oblations of food or libations of water; but even in their case the doctrine of spiritual benefit is not forgotten. Thus, for instance; the lowest amongst them, namely, the learned Brahmin of the same village, is allowed to come in upon the express ground that "the virtue of the deceased proprietor is renewed by the acquisition of fresh merit through the circumstance of his wealth devolving on a Brahmin"—

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verse 26, Section VI, Chapter XI. This, no doubt, is an extreme case of the kind; but we wish to draw particular attention to it as an instance of the extreme solicitude evinced by the author of the Dayabhaga to provide for the spiritual welfare of a deceased proprietor. Again, when we come to look at the internal arrangement of each of these classes, so far as the details of such arrangement are actually given in the Dayabhaga, we find that the same principle is always kept in view. Thus among the *sapindas* those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only; and the reason assigned for the distinction is that the first kind of cakes are of superior religious efficacy in comparison with the second. Similarly, those who offer a larger number of cakes of a particular description, are invariably preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those that are offered to nearer ancestors, are always preferred to those offered to more distant ones. The same remarks are equally applicable to the *sakulyas* and *samanodocas*; but it would be tedious to enter into further details.

Having shown by the preceding observations that the principle of spiritual benefit is the sole foundation of the theory of inheritance propounded in the Dayabhaga, we proceed to determine whether the particular claimant before us, namely, the son of a paternal uncle's daughter is competent to confer any such benefit on the deceased proprietor. We are of opinion that he is, and we may add that this point was not even contested before us by the pleader for the respondent.

That the paternal uncle's daughter's son of a Hindu is one of his *sapindas*, is a proposition beyond all controversy. The whole doctrine of *sapinda* is contained in the following passage of the Dayabhaga.

"Since the father and certain other ancestors partake of three oblations as participating in the offering at obsequies, and since the son and other descendants to the number of three, present oblations to the deceased (or to be shared by his manes)

and he who, while living, presents an oblation to an ancestor, partakes when deceased of oblations presented to the same person; therefore, such being the case, the middlemost of seven who, while living, offered food to the manes of ancestors, and when dead partook of offerings made to them, became the object to which the oblations of his descendants were addressed in their life-time, and shares with them when they are deceased the food which must be offered by the daughter's son (and other descendants beyond the third degree). Hence, those ancestors to whom he presented oblations and those descendants who present oblations to him, partake of an undivided offering in the form of (*pinda*) food at obsequies. Persons who partake of such offerings are *sapindas*"—Colebrooke's Dayabhaga, Chapter XI, Section I, verse 38.

It is clear from the above passage, that if two Hindus are bound during the respective terms of their natural life to offer funeral oblations to a common ancestor or ancestors, either of them would be entitled after his death to participate in the oblations offered by the survivor to that ancestor or ancestors; and hence it is that the person, who offers those oblations, the persons to whom they are offered, and the person who participates in them are recognized as *sapindas* of each other. That this definition of *sapinda* is good for all purposes of inheritance is conclusively shown by the very next verse, which says:—"This relation of *sapinda* (extending no further than the fourth degree) as well as that of *sakulyas* has been propounded *relatively to inheritance*."—Colebrooke's Dayabhaga, Chapter XI, Section I, verse 39.

In order to apply this definition to the particular case under our consideration, we think it necessary to make a few preliminary observations on the ceremony of *Parbuna Shraddh*, which has been already referred to in an earlier part of this judgment. This ceremony consists in the presentation of a certain number of oblations, namely, one to each of the first three ancestors in the paternal and maternal lines respectively, or in other words, to the father, the grand-father, and the great-grand-father in the one line, and the maternal grand-father, the maternal great-grand-father and the maternal great-great-grand-father in the other. It is for this reason that this cere-

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mony is frequently referred to in the Dayabhaga under the name of the *Troipoorshick pind*, or *pind* relating to three ancestors, and it is through the oblations presented at this ceremony that the relation of *sapinda* propounded in that treatise admittedly arises. Every Hindu is bound by his religion to perform this ceremony; for his own salvation, which is intimately connected with that of his ancestors, is absolutely dependant on such performance; and of all the ceremonies prescribed by that religion it is therefore the most important.

Such then being the nature of the *Parbuna Shraddh* and of the obligation to perform it, it is clear that the deceased proprietor was just as much bound to fulfil that obligation as his paternal uncle's daughter's son, who is now claiming his estate by right of inheritance. Now it is obvious from the very position of the parties that the maternal great-grand-father and the maternal great-great-grand-father of the latter are no other persons than the paternal grand-father, and the paternal great-grand-father, respectively, of the former; and the conclusion is therefore inevitable that they are *sapindas* of each other according to the strictest interpretation of the Dayabhaga.

The deceased proprietor was bound to offer funeral cakes to his own paternal grand-father and paternal great-grand-father during his life time; and he is, therefore, entitled after his death, to participate in the cakes that are now offered to those very persons by the son of his paternal uncle's daughter.

But there is another mode for arriving at the same conclusion. The deceased proprietor, it will be seen, was the grand-son of the maternal great-grand-father of the appellant; and it is admitted that the grand-son of the maternal great-grand-father is entitled to inherit as a *sapinda* according to all the authorities current in the Bengal School. If, therefore, the deceased proprietor was a *sapinda* of the appellant, it would necessarily follow from the very definition of that term that the latter is also a *sapinda* of the former; for if *A* is connected with *B* through the medium of undivided oblations, the conclusion is irresistible that *B* is also connected with *A* through the same medium. There is, however, an important distinction between the two cases to which particular attention is required. The oblations which the deceased proprietor would have offered to

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his own paternal grand-father and paternal great-grand-father would have gone to the maternal great-grand-father and the maternal great-great-grand-father of his paternal uncle's daughter's son: whereas the oblations offered by the latter to his own maternal great-grand-father and maternal great-great-grand-father would go to the paternal grand-father and the paternal great-grand-father of the former. Now, it has been already observed that according to the Dayabhaga, oblations offered to paternal ancestors are of higher spiritual value than those offered to maternal ancestors; so that it is clear that the appellant is a much nearer *sapinda* of the deceased proprietor than the deceased proprietor was of the appellant.

Having shown by the foregoing observations that the son of a paternal uncle's daughter is fully entitled to come within the principle of spiritual benefit, which constitutes the fundamental basis of the law of inheritance propounded in the Dayabhaga, we will now proceed to examine the various objections that have been urged before us against his right to succeed as an heir.

It has been contended that the son of a paternal uncle's daughter has been nowhere mentioned as an heir in the Dayabhaga. We are of opinion that this objection is entitled to no weight whatever. Every one who has gone through the Dayabhaga must have perceived that the specific enumeration of each individual heir was not the object which the author had in view. It is perfectly true that a few of the heirs have been mentioned by name here and there; but the great majority of them have been left to be determined by the application of the principle of spiritual benefit. Thus of the numerous relatives who are entitled to come in as *sapindas* by virtue of their right to offer oblations to the maternal ancestors of the deceased proprietor, the maternal uncle is the only one who has been mentioned by name. Then, again, among the *sakulyas* or kinsmen connected by divided oblations, the grand-son's grand-son is the only person who has been specifically enumerated; and of the *samanodacas*, or kinsmen connected by libations of water, not one even has been so enumerated. In the face of all these facts, it is impossible to contend that the mere absence of specific enumeration is any ground whatever for

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excluding one single individual who is really competent to fulfil the conditions of heirship laid down in the Dayabhaga itself.

It has been further contended that the order of succession specified in the Dayabhaga down to the *sakulyas* is so precise and complete by itself that there is no room left for the introduction of the paternal uncle's daughter's son, who, if he is entitled to come in at all, must come in among the earlier class of heirs, namely, the *sapindas*. We are of opinion that this objection too must fail. If the Dayabhaga were a work of the same character as the Dyakrama Sungraha of Sree Kishen Turkolunkar, which does not pretend to do any thing more than to lay down a mere table of succession or categorical list of heirs, there might have been some foundation for this argument. But, when we consider that the real object which the author of the Dayabhaga had in view, was to establish a general principle of his own, and not to go through all the particular applications of that principle, as is evident from our answar to the first objection, it is impossible to attach any weight to an argument of this sort. If the claimant in this case had been the son of a maternal uncle's daughter or some other relative of the same description, who is merely competent to offer oblations to the maternal ancestors of the deceased proprietor, no such objection could have been possibly urged against him according to the strictest interpretion of the Dayabhaga. Why, then, are we to suppose that the author of that work intended to exclude the son of the paternal uncle's daughter, when it is beyond all question that he is competent to offer oblations to a much higher class of ancestors, namely, the paternal? Why, in fact, are we to suppose that the enumeration of the one class of *sapindas* was intended to be exhaustive, whilst that of the other and a far inferior class was intended to be merely illustrative? If doubts are still entertained on this point, we have only to refer to the provisions of verse 19, section VI, chapter XI of the Dayabhaga. The following is a literal translation of that verse from the original:

"Therefore, a kinsman who is allied by a common oblation as presenting funeral oblations called the *Traipoorshick Pind* in the family of the father, or in that of the mother of the

deceased owner; such kinsman having sprung from his *kool*, or stock, though of different male descent, as his own daughter's son or *his father's daughter's son, etc.*, or having sprung from a different stock *as his maternal uncle* etc., [is heir] and the text (To three must libations, &c.) is intended to propound the succession of such kinsmen, and the subsequent passage (To the nearest *sapinda* the inheritance belongs) must be explained as meant to discriminate them according to their degree of proximity.)"

Now, it is beyond all question, that the son of a paternal uncle's daughter is a *sapinda* of the same description as the son of the father's daughter; and if it is once conceded, as it must be that the word "etc." used after the words "maternal uncle," is comprehensive enough to include every relative who is competent, like the maternal uncle, to offer funeral oblations to the maternal ancestors of the deceased proprietor, we do not see any reason whatever why the same word "etc.", which is also used after the words "father's daughter's son", should not be considered as comprehensive enough to include every relative, who is competent, like the father's daughter's son, to offer such oblations to his paternal ancestors. It is perfectly clear that both the texts of Menu relied upon in this verse are as general in their character as possible; for the name of a single heir is not mentioned in either of them. Why, then, are we to suppose that the author of the Dayabhaga intended to limit the operation of those texts in the case of those *sapindas* who are competent to offer funeral oblations to the paternal ancestors of the deceased proprietor at the very time when he was extending that operation to every *sapinda* who is competent to offer such oblations, to his maternal ancestors only? Surely, if this had been the real object of the author of the Dayabhaga, in open defiance of his own construction of Menu, who is universally regarded as the highest authority on all questions of Hindu Law, he would have not only expressed it in a language which could not possibly be mistaken, but he would have also assigned some reason, good, bad, or indifferent, to justify such a gross departure from the very principle which he has so often declared to be the fundamental basis of all his speculations. On the contrary, let us consider for one moment what he has himself stated in

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verse 30, section VI, chapter XI. This verse, which contains the final resume of all his discussions on the subject of inheritance, as is clear from the very position which it occupies in the Dayabhaga, runs as follows :—

"In like manner, the appropriation of the wealth of the deceased proprietor to his benefit in the mode which has been stated, *should in every case be deduced according to the specified order.*"

Here, then, is a positive injunction to determine *every case* relating to the law of inheritance according to the doctrine of spiritual benefit ; and it is distinctly stated in the very next verse that this doctrine has the fullest sanction of Menu and other sages, from whom the whole Hindu Law is derived. The word "*deduced*" used in the passage above quoted demands particular attention. If the author of the Dayabhaga had supposed that all the details connected with the law of succession had been finally settled by himself, no necessity for any kind of *deduction* whatever could have possibly existed ; and on such a hypothesis, all that he would have required us to do would have been merely to follow those details according to his own directions in each particular case. It has been said that the words "*according to the specified order*" would rather go to support such a hypothesis ; but it is clear that the specification referred to in this place is no other than that contained in the preceding verse which merely says "that the order of succession is regulated by the degree of benefit."

Lastly, it has been urged that the precise position which the son of a paternal uncle's daughter would be entitled to hold according to the principle of spiritual benefit, would interfere with that which has been assigned by the author of the Dayabhaga to some of the heirs specified in the earlier part of Chapter XI. Whether this is really the case or not, we need not pause to enquire, for what we have to determine in the present case is not the precise position which the son of a paternal uncle's daughter is entitled to occupy in the category of heirs, but whether he is entitled to inherit at all. If the author of the Dayabhaga has in fact given to any particular heir or heirs a position which is not strictly consistent with the principle which he has himself laid down for our guidance, the utmost

that can be said is that that particular heir or heirs should be allowed to retain that position. But this circumstance, even if true, cannot be accepted as a sufficient reason to justify the total exclusion of one single-individual who is really competent to satisfy all the requirements of that principle. If in any case which may arise hereafter, it should become necessary for us to determine the precise position which the son of a paternal uncle's daughter is entitled to hold in the order of succession, the question would fairly arise, namely, whether the details of a work like the Dayabhaga ought to be permitted to over-ride the principle upon which it is admittedly based. We have already shown that according to the author's own interpretation of Menu, the nearest heir is he who is competent to confer the greatest amount of spiritual benefit on the deceased proprieter. But if, in any case, we are bound to depart from that interpretation merely because he himself has done so we do not see any reason whatever why we should add to the inconsistency by pushing it further than the requirements of that particular case. "*Decision must not be made*", says Brihuaspati, "*solely by having recourse to the letter of written codes; since if no decision were made according to the reason of the law there might be a failure of justice.*" That this rule of construction is perfectly consistent with the dictates of good sense and natural justice, is beyond all question; and that we can safely accept it for our guide in the present case, is evident from the fact that the authority of its framer is repeatedly acknowledged in the Dayabhaga itself, to be one of the very highest on all questions relating to the Hindu Law of Succession.

For the foregoing reasons, we are of opinion that the son of a paternal uncle's daughter is entitled to be recognized as an heir according to the Hindu law current in the Bengal School.

PEACOCK, C. J.—I concur in the above judgment, and I would add that the above view is borne out by the Dyacrama Sungraha, chapter I, section 10, para. 9, where it is said, "In default of the paternal grand-father's daughter's son, the uncle's daughter's son succeeds, because he presents two oblations in which the deceased owner participates namely, to the owner's

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paternal grand-father and great-grand-father (*i. e.*, his own maternal great-grand-father and great-great-grand-father.)"

KEMP and MACPHERSON, J.J.,—Concurred.

HOBHOUSE, J.—I adhere to my origional judgment given on the reference, and I concur in this judgment as practically in accordance with my own.

NOTE.—This case lays down that under the Dayabhaga the doctrine of spiritual benefit is the guiding principle in ascertaining whether a person is in the line of possible heirs to a deceased person as also in fixing his position in the order of succession; and although it has been maintained by very learned Hindu lawyers that this rule does not correctly represent the doctrine of Jimutavahana, it must now be taken as firmly established.

The principal benefit that is generally kept in view in this connection, is that derived from the offering of *pindas* at *sruddhas* of the description known as *purvana sraddhas* which are performed on occasions of which the principal is the *Mahalaya* or the *Amabasya* day immediately preceding the Durga Puja in autumn.

At a *purvana sraddha* a Hindu is bound to offer *pindas* to his deceased father, grand-father, and great-grand-father, as well as to his deceased maternal grand-father, maternal great-grand-father and maternal great-great-grand-father. Thus the only persons from whom a deceased person can directly receive pindas at a *purvana sraddha* are his son, grand-son or great-grand-son and his daughter's son, son's daughter's son and grand-son's daughter's son.

A deceased person moreover by virtue of a ceremony known as the *Sapindakarana* participates in *pindas* directly offered to any of his three immediate paternal ancestors. It follows therefore that a deceased person enjoys *pindas* offered by a person who stands in the relationship of son, grand-son, great-grand-son daughter's son, son's daughter's son or grand-son's daughter's son to any of his three immediate paternal ancestors.

Benefit through enjoyment of *pindas* does not go further, and the reasoning by which the maternal relations are sought to be brought in as conferrers of spiritual benefit is no doubt open to criticism. They offer no *pindas* to the deceased nor any in which he can participate; but it is said that by offering *pindas* to his three maternal ancestors to whom he, while alive, was bound to offer *pindas*, they confer some sort of spiritual benefit on him.

All these relatives, namely, the direct givers of *pindas* to the deceased, the offerers of *pindas* in which the deceased participates and the maternal relations, who are connected with the deceased in respect of the offering of *pindas* simply because they offer *pindas* to his maternal ancestors to him he too was bound to give *pindas*, are regarded by the Dayabhaga as *Sapindas* within the meaning of the text of Menu.

"धनं तदीयं सपिण्डाः यस्मात् तस्मात् धनं भवेत्।
धनं ऋते सकुल्याः स्युः आदाचार्याः शिष्य एव वा॥"

After them come the *Sakulyas* and then the *Samanodakas*.

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The facts of the case were that the plaintiffs, Anund Lal and others, who were fifth in descent from the great-grand-father of one Gangadhar deceased, sued to set aside an alienation made by Gangadhar's widow in favour of the defendant Guru Govind who was the appellant before the High Court ; one Panchanan who was Gangadhar's uncle's daughter's son was in existence, and the point was that if Panchanan was in the line of succession, the plaintiffs who were merely *Sakulyas* were not entitled to maintain the suit, as Panchanan, being a *Sapinda* would be the preferential heir. The contest therefore was between *Sapinda* and a *Sakulya*. In a later case where the contest was between two persons both of whom were *Sapindas*, namely a brother's daughter's son and a paternal grand-father's great grand-son, it has been held that the former who is not mentioned in the Dayabhaga could not succeed in preference to the latter who is there mentioned, on the ground that the amount of benefit conferred by him may be greater than that conferred by the latter. (Huri Das *v.* Bama Churn, I. L. R., 15 Calc. 780. The reader will observe that this point was left open in the principal case.

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[*Reported in L. R. Sup. I. A., 47 ; 9 B. L. R., P. C., 377 ; 18 W. R., 859.*]

The following judgment was delivered by

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MR. JUSTICE WILLES.—These were consolidated cross-appeals from a decree of the High Court of Judicature in Bengal (Appellate side), disposing of numerous questions touching the right of succession to valuable property, partly ancestral and partly acquired, of the late Honourable Prosonnocumar Tagore, a Hindoo inhabitant of Calcutta, who died on the 30th of August, 1868, leaving his only son, the plaintiff, and two widow daughters, with six grandchildren, the children of daughters, him surviving.

The defendants are three of the trustees and executors under the will of Prosonnocumar, dated the 10th of October, 1862, together with the persons in existence who claim a beneficial interest under the will, other than legacies and annuities (which are not disputed). The trustees and executors are Opendramohun Tagore, and Jotindramohun Tagore and Durgapersaud Mookerjee.

Jotindramohun Tagore is named as the first tenant for life and he had, and has, no son.

The defendant Sourendramohun Tagore (named in the will Shooshendramohun Tagore) is also named as tenant for life.

The defendant Promodecumar Tagore (a minor) is the son of Sourendramohun Tagore, and was born in the lifetime of the testator. He is described as tenant for life.

The remaining defendant, Suttendramohun Tagore (a minor) is the grand-son of Lulitmohun Tagore, who was dead at the date of the will. He was born in the lifetime of the testator. His father and grand-father died before the testator. If the will be valid, he is entitled to an estate in tail male.

It does not appear that any other person beneficially interested is in exsistence. The fourth trustee has not acted, though he does not appear to have renounced. No question as

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to parties has been raised, except as to the alleged want of any description of the capacity in which Jotindramohn Tagore has been sued. This latter point was not argued before their Lordships, and they see no reason for doubting that the High Court rightly over-ruled it.

The will provided for the testator's daughters and grandchildren, but made no provision for the plaintiff, stating that he had been already provided for in the testator's lifetime. That provision was made by nuptial gift on the occasion of the plaintiff's marriage in the year 1843, when there was settled upon him absolutely, by his father, a zemindari, which then fetched rupees 7,000 per annum, and the present value of which the plaintiff does not state. Upon the death of the plaintiff's first wife, his father also paid him the value of her jewels, to which he laid claim. The explanation of the exclusion of the plaintiff from any further provision by this will is supplied by the fact that he had become a Christian in the year 1851. No proceedings of exclusion or degradation had, however, followed or been attempted. Nor does any such question arise as was discussed in *Abraham* v. *Abraham* (1) as to the law applicable to the convert's own property or as to the personal relations of him and his family. The Act XXI of 1850 appears to their Lordships to be conclusive to show that this change of religion does not affect the plaintiff's right of inheritance or suit.

As the present litigation turns upon the validity of the will, it will be convenient to state its effect, citing in terms those parts of it which call for interpretation. It was in the English language.

After reciting that the testator had acquired in severalty large estates, both real, and personal, partly ancestral, but for the most part by his personal industry, and that the testator had already made such provision for his son Ganendramohun Tagore (the plaintiff) as he considered sufficient, and that Ganendramohun Tagore would "take nothing whatever under the will", it purports to give all the testator's property to four trustees, of whom Jotindramohan Tagore was one, "their heirs, executors, administrators, representatives, and assigns," upon trust.

(1) 9 Moo. I. A. 195; 1 W. R., P. C., 1 ; 2 Pandit P. C. J., 10.

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As to the personalty (except jewels, &c., in the personal use of members of his family, and such jewels, &c., as "the person or persons for the time being beneficially interested in the real estate or the income, or surplus income thereof, shall wish to retain for his and their own use"), to pay funeral expenses, debts, and ordinary legacies within a year after his death, and to sell and to convert the rest into money and securities, and invest the proceeds in the name of the trustees, with power to change the securities :

To pay annuities afterwards given (except 1,000 rupees a month afterwards given for worship) and legacies payable after the investment : and

"After payment of such annuities and legacies do and shall pay the surplus unexpended of the said interest, dividends, and annual proceeds unto the person or persons who for the time being shall under the limitations and directions hereinafter contained and expressed, be entitled to the beneficial enjoyment of my real property, or of the rents and profits or surplus rents and profits thereof; and so soon as all of the said annuities and lagacies shall have fallen in and been fully paid and satisfied, do and shall stand possessed of and interested in the said trust moneys and securities, and the interest, dividends, and annual proceeeds thereof, in trust absolutely for the person or persons entitled under the limitations and directions hereinafter contained and expressed, to the beneficial or absolute enjoyment of my said real property :"

And as to "realty or immoveable property," or of the nature of realty, "to apply the profits in aid of the income of the personalty in payment of debts, legacies, and annuities :"

To pay 1,000, rupees a month for the worship of idols :

And the residue "to the person or persons" for the time being entitled to the beneficial enjoyment of the real estate under the subsequent directions of the will "for the absolute use of such person or persons respectively," and the will desires that the "trustees or trustee shall hold the said real estate generally for the use and benefit of such last mentioned person or persons for the time being, so far as is consistent with the trusts and provisions" of the will; that, after payment of expenses of management, the person or persons for the time being entitled to the beneficial enjoyment of the real

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property, or of the income or surplus thereof, should receive rupees 2,500, a month, and that the legacies and annuities should be paid gradually out of the balance, with interest at 5 per cent.

The will then directs as follows :—

"And so soon as all the legacies, and annuities (save and except the said sum of rupees 1,000, for the worship of the said idols), given by this my will, shall have fallen in or been paid and fully satisfied, then in trust forthwith, to convey the said real estate and premises unto and to the use of the person who shall under the limitations and directions herein contained be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions, and directions as are hereinafter contained and expressed of and concerning the said real estate, so far as the then conditions of circumstances will permit, and so far (but so far only) as such limitations or directions can be introduced into any deed of conveyance or settlement without infringing upon or violating any law against perpetuities which may then be in force, and apply to the said real estate or the conveyance or settlement of it as last aforesaid (if any such law there shall be)."

All the gifts, &c., in the will are declared to be subject to the bequest to the trustees, and to the provisions and declarations with reference thereto.

The will, then, after reciting that the testator's father had established certain idols at Mollajohur, and had given a talook to supply the means for their worship, and that such provision was insufficient, gives the rupees 1,000, before mentioned, per month for the purposes of the worship.

Provisions follow for the members of his family, other than the plaintiff, by annuities and legacies, to vest upon the testator's death. Then follow provision, for servants, for charities, and for founding the Tagore Law Professorship.

The will then disposes of the real property as follows :—

"And whereas I am, amongst other property, possessed of and entitled to a zemindari or talook called Pergunnah Patleadah, and Kismut Patleadah, in Zilla Rungpore, subject to an annual consolidated jumma, payable to government, of rupees 40,555-13-3, and I am also possessed of and entitled to other estates and property in Zilla Rungpore and other districts, and also to a ghaut, which I have erected and built on the river bank side of the Strand Road in Calcutta, and also to land and buildings opposite thereto, abutting on and near to the said road, and also to the Boitakkhanah house, land and premises, where I usually reside, and also to various other parcels of real estate. And whereas the frequent

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division and sub-division of estates in Bengal is injurious alike to the families of zemindars and to the ryots, who are in consequence oppressed by numerous and needy landlords having conflicting interests, whence arise disputes and litigations. And whereas I have bestowed much time and money on the improvement of my estates and of the condition of the ryots and tenants thereof and I am desirous that such improvements should continue to go on, and should not be interrupted by any division of the said estates, or disputes concerning the same: Now, therefore, I give and devise (subject always to the devise to the said Romanauth Tagore, Opendramohun Tagore, Jotindramohun Tagore, and Durgapersaud Mookerjee hereinbefore contained) all the real property of what particular tenure, nature or kind soever, and also library, horses, carriages, farmyard, furniture of the Boitakkannah, jewels, gold and silver plates, &c., which I shall, at the time of my death, be possessed of or entitled to, to and for the following uses, and subject to the following provisions and declarations, that is to say:—Unto and to the use of the said Jotindramohun Tagore, for and during the term of his natural life; and from and after the determination of that estate, to the use of the eldest son of the said Jotindramohun Tagore, who shall be born during my life for the life of such eldest son; and after the determination of that estate to the use of the first and other sons successively of the said eldest son of the said Jotindramohun Tagore, according to their respective seniorities, and the heirs male of their respective bodies issuing successively; and upon the failure or determination of that estate, to the use of the second and other sons of the said Jotindramohun Tagore, who shall be born during my life successively, according to their respective seniorities, for the life of each of such sons respectively; and upon the failure or determination of that estate, to the use of the first and other sons successively of such second or other sons of the said Jotindramohun Tagore and the heirs male of their respective bodies issuing, so that the elder of the sons of the said Jotindramohun Tagore born in my lifetime, and his first and other sons successively, and the heirs male of their respective bodies issuing, may be preferred to and taken before the younger of the sons of the said Jotindramohun Tagore born in my lifetime, and his and their respective first

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and other sons successively, and the heirs male of their respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, to the use of each of the sons of the said Jotindramohun Tagore, who shall be born after my death successively, according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such sons and the heirs male of his body may be preferred to and take before the younger of such sons and the heirs male of their and his respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, then to the use of Sushendramohun Tagore, the second son of my brother, Hurrocoomar Tagore, for the term of his natural life; and after the failure or determination of that estate,——"

Then to the sons of Sourendramohun Tagore and their sons, and the heirs male of their body respectively, in like manner as for Jotindra's, and after the failure or determination of the said several estates and uses, to the first and other sons, and their sons, and the heirs male of their bodies, of Lullitmohun Tagore successively and respectively in like manner as in the case of the sons of Jotindra and Sourendra. Like limitations as to other persons, as to which no further question arises.

Then follows a provision that adopted sons shall be deemed sons of the body within the will, but be postponed to actual issue of the body.

The will then contains a special provision for preserving strictly the character of the estates of inheritance which it proposes to create, as follows :—

"And I declare that in the construction of this my will, sons by adoption shall always be deemed younger than, and be postponed to sons who are the issue of the body of their father, and that the elder line shall always be preferred to the younger, and that every elder son of each heir in succession by descent, and, failing descent, by adoption, and his issue or heir male by descent, and, failing descent, by adoption, shall be preferred to every younger son and his issue or heir male by descent or adoption, to the exclusion of females and their descendants, and to the exclusion of all rights and claims for provision or maintenance of any person, male or female, out of the estate."

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It next provides that such estates of inheritance shall not be alienable, as follows :—

"And I declare my will and intention to be to settle and dispose of my estate in manner aforesaid as fully and completely as a Hindu born and resident in Bengal may give or control the inheritance of his estate, or a Hindu purchaser may regulate the conveyance or descent of property purchased or acquired by him, and subject to any law or custom of England whereby an entail may be barred, affected, or destroyed."

Then follows a proviso for cesser and limitation over of the estates, whether for life or inheritance, in case of any part of them being permitted by any holder "to be sold for arrears of Government revenue", or in case of failure "to keep up in a due state of repair, and to use as his residence in Calcutta," the testator's house and furniture, &c., in which case the person next in succession is to take as in case of death.

There follows a power to improve and to make leases for twenty years without fine, and with power of re-entry.

The remainder of the will consists in directions to the trustees as to management and a power of appointment of new trustees in case of death, refusal, or incapacity; and it appoints the trustees to be executors, and gives certain powers to "the acting executors or executor."

There are two codicils. The first makes further provision for the children of a daughter. It speaks of the testator's "trustees or trustee." The second revokes that portion of the will which relates to worship and charity, which it states to have been otherwise provided for by the testator.

The plaint, after stating these facts, alleges that the trustees and executors have, against the directions in the will, improperly sold or disposed of a portion of the *corpus* of the personal estate, consisting of Company's paper, and that there is danger of future waste.

The plaint prays in substance that it be declared

1. That the plaintiff, as only son and heir-at-law, is entitled to represent the estate;

2. That the testator had no absolute power of disposition, especially of ancestral estate;

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3. That the trusts as to the residue, after payment of the testamentary expenses, legacies, and annuities, are void, or at least void, save so far as they give Jotindramohun Tagore a life-interest, and that plaintiff is entitled after Jotindramohun Tagore's death ;

4. That the plaintiff is entitled to an account of the property, and the declaration of the rights of the parties, and incidental relief by receiver, injunction, and otherwise for securing his interest, and an adequate maintenance, if he be not declared entitled to an immediate interest ; and

5. For further relief.

The answer of the trustees and executors, and that of Sourendramohun Tagore, admit the main facts, with some qualifications not at present material ; and that of the trustees and executors denies that they have improperly disposed of the estate. They submit that the will is valid, and ask for proper declarations and directions.

The infant defendants respectively pray that their rights, if any, may be protected by the Court.

The following issues were settled by the High Court :—

"*First.*—Does the plaint disclose any cause of action ?

"*Second.*—Did the testator die intestate with respect to any and what portion of his estate ?

"*Third.*—Was any and what part of the immoveable property of the testator ancestral estate, and if so, had the testator power to dispose thereof by will ?

"*Fourth.*—Are any and which of the gifts or limitations contained in the will and codicils of the testator void in law ?

"*Fifth.*—What are the rights of the parties respectively under the will and codicils ?

"*Sixth.*—Whether the plaintiff is entitled to any and what maintenance out of the estate of the said testator ?

"*Seventh.*—Whether the executors, defendants, have misapplied any and what portion of the testator's estate ?"

At this stage, the cause was heard before the High Court (Ordinary Original Civil Jurisdiction), and the learned Judge, Mr. Justice Phear, dismissed the plaint.

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Upon appeal before the High Court (Appellate Jurisdiction), present Chief Justice Peacock, and Mr. Justice Norman, it was decreed—

(*a*) That the decree of the Lower Court be reversed;

(*b*) That the plaint in this suit does disclose a cause of action;

(*c*) That Prosonnacumar Tagore, the testator in the pleadings, did die intestate as to certain portions of his property;

(*d*) That part of the immoveable property of the said testator was ancestral estate, and that he had a right to dispose thereof by will;

(*e*) That the plaintiff is not entitled to any maintenance;

(*f*) That the devises and gifts to Jotindramohun Tagore for life are valid, and that (subject to debts, legacies, and annuities), he is entitled during his life to the beneficial enjoyment of the real property, and that he is entitled until the legacies and annuities shall fall in and be satisfied, to recieve the sum of rupees 2,500, a month out of the net rents of the immoveable property, and also the surplus rents of the said immoveable property, and the unexpended surplus of the interests, dividends, and annual proceeds of the moveable property which shall, from time to time, remain unexpended;

(*g*) That the said Jotindramohun Tagore is entitled for life to use and enjoy the library, jewels, and other personal property directed to go with the real estate;

(*h*) That it is not necessary to come to any further finding upon the residue of the fourth issue, or to make any declaration of rights so far as they relate to the immoveable property, or to any portion of the rents thereof, or as to the surplus income of the personalty, so long as the debts, legacies, and annuities are unsatisfied;

(*i*) That the trust as to the personal estate, after the annuities and legacies given by the will shall have fallen in and been fully satisfied, is void and invalid, and that the beneficial interest in such personal estate is vested in the plaintiff, as the heir and representative of the said testator;

(*k*) That the executors and trustees are bound to render to the plaintiff an account;

(*l*) And after disposing of the costs, it was ordered and decreed:-

(*m*) That the case may be remanded to the Lower Court, with a request that it will try the sixth (*a*) issue, and return its finding thereon with the evidence, to the appellate Court.

Thereupon appeals were preferred to Her Majesty in Council by the plaintiff, by Jotindramohun Tagore, and by Sourendramohun Tagore respectively, which have been consolidated, and the case was argued before this Board, when their Lordships adjourned the hearing in order to allow the defendant, Suttendramohun Tagore, who was not represented on the argument, the opportunity of being heard. Of that opportunity he has not availed himself, and the case is ripe for judgment.

The questions presented by this case must be dealt with and decided according to the Hindu Law prevailing in Bengal, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property or the right of inheritance or succession thereto. Various complicated rules which have been established in England, are wholly inapplicable to the Hindu system, in which property, whether moveable or immoveable is, in general, subject to the same rule of gift or will and to the same course of inheritance. The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty,—a distinction not known in Hindu Law. The only trace of religion in the history of the law of succession in England is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property—*Dyke* v. *Walford* (1). In the Hindu Law of Inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased.

(*a*) Intended for the seventh.

(1) 5 Moore, P. C., 434.

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Whilst, however, rules of detail prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character, which have been strongly argued in this case, and as to which there is no precise authority.

The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law.

Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy (1).

It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in *Soorjeemoney Dossee* v. *Denobundoo Mullick* (2):—"A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."

Another general principle applicable to transfers by gift (more liberally applied in the law of England to wills than to gifts *inter vivos*) is, that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows.

Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs.

If an estate were given to a man simply without express words

(1) Domat, 2413.

(2) 6 Moo. I. A. 555 ; 4 W. R., P. C., 114 ; 1 Pandit P. C. J. 583.

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of inheritance, it would in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in England) as estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass.

If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize.

If, on the other hand, the gift were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth, for ever to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime,—here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect except in favour of such persons as could take under a gift to the exent to which the gift is consistent with the law. The first taker would in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void.

It follows that all estates of inheritance created by gift or will so far as they are inconsistent with the general law of inheritance are void as such, and that by Hindu Law no person can succeed thereunder as heir to the estates described in the terms which in English law would designate estates tail.

It remains, however, to be considered whether the persons described as heirs in tail, or heirs of inheritance not recognized

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by law are sufficiently designated to take successively by way of gift that which the will incorrectly assumes to give them as heirs, so that they may be regarded as a succession of donees for life, having the power and subject to the restrictions sought to be imposed by the will upon the successive heirs in tail, or whether the language of the will is such as to show that the first taker was to have an estate of inheritance according to law, and that the words of special inheritance may be said to include such estate at least, and the residue be rejected as an attempt to impose fetters inconsistent with the law.

This makes it necessary to consider the Hindu Law of gifts during life and of wills, and the extent of the testator's power, whether in respect of the property he deals with, or the person upon whom he confers it. The law of gifts during life is of the simplest character. As to ancestral estate, it is said to be improper that it should be aliened by the holder, without the concurrence of those who are interested in the succession, but by the law as prevailing in Bengal at least (1), the impropriety of the alienation does not affect the legal character of the act (*factum valet*), and it has long been recognized as law in Bengal that the legal power of transfer is the same as to all property, whether ancestral or acquired. It applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect so as to fall within the principle expressed in the Dayabhaga, Chapter i. v. 21, by the phrase "relinquishment in favor of the donee who is a sentient person." By a rule now generally adopted in jurisprudence, this class would include children in embryo, who afterwards come into separate existence.

As to the case of adopted children (so much relied upon during the argument), it is distinguishable because of the peculiar law applicable to that relation. The Hindu Law recognizes an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death, from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law such

(1) As to Madras, see to the same effect, *Valinayagam Pillai* v. *Pachche*, 1 Madras High Court Rep., 326 ; 1 Norton, L. C. 334, S. C.

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child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect.

As to gifts by way of will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions both here and in India, proceeding upon the assumption that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos*. The same may be said of the Roman law as pointed out by Mr. E. C. Clark in his interesting treatise upon "Early Roman Law," p. 118, in which the testamentary power, apart from public sanction, appears to have been a development of the law of gifts *inter vivos*. Such a disposition of property, to take effect upon the death of the donor, though revocable in his lifetime, is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator as they would if he had given the property to them in his lifetime. There is no law expressly and in terms applicable to persons who can so take. The law of will has, however, grown up, so to speak, naturally, from a law which furnishes no analogy but that of gifts, and it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisprudence in new cases was stated by Lord Wensleydale, in the opinion delivered by him as a Judge in the House of Lords, in the case of *Mirehouse* v.

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Rennell (1), in accordance with principles generally recognized. "This case", said Lord Wensleydale,—"is in some sense new, as many others are which continually occur, but we have no right to consider it, because it is new as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves according to our judgment of what is right and expedient. Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity, consisteney, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be of great importance to keep this principle steadily in view, not merely for the determination of this particular case, but for the interests of law as a science." The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred.

The judgment delivered by the Lord Justice Knight Bruce in the case of *Sreemuty Soorjeemoney Dossee* v. *Denobunahoo Mullick* (2), was much relied upon to show that the English law as to executory devises ought to be applied in dealing with Hindu succession, and Mr. Justice Phear, upon the authority of that case, held that, "there is nothing in Hindu law to prevent a testator from making a gift of property to an unborn person, provided the gift is limited to take effect (to use the words of the Privy Council) if at all, immediately on the close of a life in being." The expression in the judgment of the Lord Justice thus relied upon, was as follows:—"We are to say whether there is anything against public convenience, any thing generally mischievous, or anything

(1) 1 Cl. & F., 546.

(2) 9 Moo. I. A. 135; 1 Pandit P. C. J. 837.

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against the general principles of Hindu Law in allowing a testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not, and that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist." A consideration of the subject-matter to which these remarks were applied, will, however, at once show that, they were not intended to have the extensive effect attributed to them. The question was not as to the effect of a gift to a person not in existence, but, whether a person in existence, and capable of taking under the will when it had effect, might become entitled upon a future contingency to receive an additional benefit. The testator devised an estate to several sons, with a proviso that, if either of such sons died without having a son or son's son living at his death, neither his widow nor daughter should get his share, but that the same should go over to the other sons. Their Lordships held the gift over to be valid. The point in question, therefore, was not raised, and could not have been decided as supposed. Moreover, in the subsequent case of *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdry* (1), in which the testamentary power of disposition by Hindus in Bengal was fully recognized, it was distinctly laid down that the nature and extent of such power, so far as relates to contingent remainders and executory devises, is not to be regulated or governed by way of analogy to the law of England, which law applies to the wants of a state of society widely differing from that which prevails amongst Hindus in India. It is obvious, therefore, that the conclusion arrived at in the lower Court as to the result of the judgment in the former case was erroneous. Their Lordships for the reasons already stated, are of opinion that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore, must either in fact or in contemplation of law, be in existence at the death of the testator.

Their Lordships, adopting and acting upon the clear general

(1) 10 Moo. I. A., 279; 3 W. R., P. C, 15; 2 Pandit. P. C. J. 111.

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principle of Hindu Law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindu Law or usage.

These general preliminaries being laid down, it will be proper next to examine in detail the various questions raised upon the discussion of the particular will, in their natural order, first disposing of those which would apply equally to a gift as to a will, and next, to those which affect the will in question.

It was argued on behalf of the plaintiff, in the first place, that the will is void by reason of its being founded upon the creation of an estate in trustees, absorbing the whole interest in the property, and out of which the interests of the beneficiaries are to be fed. It was maintained that an estate, to be held in trust, can have no existence by the Hindu Law, and that, as the foundation of the will fails, the whole superstructure must fall. This is hardly consistent with the admission in the plaint, and upon the argument that the legacies and annuities to be paid by the trustees, and which are equally founded upon the trust, are unassailable. The plaintiff, however, is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled. This argument for the plaintiff also gives the go-by to the consideration that if the trusts be void, they are not illegal, and that if they are struck out as void, the estates capable of being created by the will, and which the trusts were introduced to secure and maintain, would thereby become impressed directly upon the estate, subject to charges for legacies and annuities which on all hands are admitted to be valid, as, for instance, upon a gift by a will to receive and pay A an annuity, and subject thereto in trust for B; if the trust be void, it should be simply struck out, and B would have the property, subject to the annuity.

Their Lordships are unable to give any effect to this argument against the admissibility of a trust. The anomalous law which has grown up in England of a legal estate which is paramount in one set of Courts, and an equitable ownership which

is paramount in Courts of Equity, does not exist in and ought not to be introduced into Hindu Law. But it is obvious that property, whether moveable or immoveable, must, for many purposes be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases.

Implied trusts were recognized and established here in the case of *benamee* purchase in *Goopeekrist Gosain* v. *Gangapersaud Gosain* (1), and in cases of a provision for charity or for other beneficient objects, such as the professorship provided for by the will under consideration, where no estate is conferred upon the beneficiaries and their interest is in the proceeds of the property (to which no objection has been raised) the creation of a trust is practically necessary.

If the intended effect of the argument upon this point was to bring distinctly under the notice of their Lordships the contention that under the guise of an unnecessary trust of inheritance the testator could not indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust, their Lordships adopt that argument upon the ground that a man cannot be allowed to do by indirect means what is forbidden to be done directly, and that the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and that after the determination of those interests the beneficial interest in the residue of the property remains in the person who, but for the will would lawfully be entitled thereto. Subject to this qualification their Lordships are of opinion that the objection fails.

As for the argument that the trust failed because one of the trustees had renounced or more correctly speaking had not acted, their Lordships think this criticism unfounded in law and wholly inapplicable to the will in question, which distinctly provides for the case of a trustee not acting, and gives a directory power to fill up the number of trustees when required.

(1) 6 Moo. I. A., 53; 1 Pandit P. C. J. 493.

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Having disposed of the question whether there can be a trust estate, and shown that the distinction between "legal" and "equitable" represents only the accident of falling under diverse jurisdictions, and not the essential characteristic of a possession in one for the convenience and benefit of another, the next subject for consideration involves the objections raised on behalf of the plaintiff to every beneficiary interest or estate created by the will, except the legacies and annuities. A summary of the provisions and limitations in the will, so far as they affect the parties to this suit, and limited for the present to the real estate and the personalty settled therewith, is as follows:—

Rupees 2,500 per month to the "*person or persons* for the time being entitled," under the will, "to the beneficial enjoyment of the said real property;"

The residue to go in aid of the income of the personal estate, which is to be first applied in payment of legacies and annuities which are to be paid "gradually and as may be found possible;"

And so soon as the legacies and annuities shall have fallen in or been satisfied, then the trustee or trustees are to convey to the person entitled to the beneficial interest, subject to the subsequent limitations, "so far as the terms and condition of circumstances will permit, and so far, but so far only, as such limitations" do not infringe any law then in force against perpetuities, "if any such law there shall be;"

The limitation referred to was as follows in the present tense; and therefere to operate at the moment the will took effect, though "subject always to the devise to" the trustees.

1. To the defendant, Jotindramohun Tagore, for life;

2. To his eldest son born during the testator's lifetime, for life;

3. In strict settlement upon the first and other sons of such eldest son successively in tail male;

4. Similar limitations for life and in tail male upon the other sons of Jotindramohun Tagore, born in the testator's lifetime, and their sons successively;

5. Limitations in tail male upon the sons of Jotindramohun Tagore, born after the testator's death;

6. "After the failure or determination of the uses and estates hereinbefore limited" to the (defendant) Sourendromohun Tagore for life;

7. Like limitations for the sons of Sourendromohun Tagore and their sons as for the sons of Jotindromohun Tagore. Under these limitations the defendant, Promodecumar Tagore, who was alive at the death of the testator, is (if the will be valid) entitled for life, subject to the life-estates of Jotindromohun Tagore and of his father;

8. Like limitations in favour of the sons of Lullitmohun Tagore, who was deceased at the date of the will, and their sons in tail male, as for the sons of Jotindromohun Tagore. Under these limitations (if the will be valid), the defendant, Suttendromohun Tagore, as the son of a son (his father having died during the testator's lifetime) would take an estate in tail male. He is the only defendant in that situation.

The will expressly and exclusively adopts primogeniture in the male line through males, preferring the eldest son, and excluding women and their descendants, and all right of provision or maintenance of either man or woman.

Then follows a statement showing that the testator desired to dispose of his estate "as fully and completely as a Hindu purchaser may regulate the conveyance or descent of property purchased or acquired by him," but "not subject to any law or custom of England whereby an entail may be barred."

This clause shows an intention that each tenant, though of inheritance, should be prohibited from alienation, a restriction which in England could only be imposed by Act of Parliament, as in the case of the settled Abergavenny estates, and some others settled upon families ennobled and endowed for public services.

Then follow the residence clauses, by which the estate was to go over in case of non-residence, or allowing any part of the property to be sold for government arrears, with powers to improve and to lease for twenty years.

A glance at this summary of the provisions of the will, with a due regard to the principles already laid down, shows that upon the face of it the will contains a variety of limtations which are void in law, as, for instance, the limitations in favour

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of persons unborn at the time of the death of the testator, and the limitations describing an inheritance in tail male which is a novel mode of inheritanco inconsistent with the Hindu Law.

The first life-interest in Jotindromohun Tagore next requires attention. It was objected to on two grounds. *First*, because it was said that Hindu law recognizes only one entire estate in the land, and does not allow of that estate being cut up into smaller distinct interests in the way of life-estate, reversion, remainder, and so forth. *Secondly*, it was said that the life-interest was void, because of the contingency and uncertainty of the period at which it was to commence, because of the preference given to the legacies and annuities, and to their being payable first out of the interest of the personalty, and then out of the rents of the realty, except the allowance of 2,500 rupees per month, so that it is said this life estate may never come into existence, because the legacies and annuities and interest on arrears, may never be completely satisfied.

As for the first objection, it amounts to this: that because there is, as was contended, only one estate technically known to Hindu Law, and that an entirety, there can be no contract by which an owner of land, may bind himself to allow to another the enjoyment of the usufruct of the land, to the exclusion of the owner, for a given time, whether for years or for life (because in the law we are dealing with the distinction of chattel and freehold has no existence), and to give exclusive right of possession for the enjoyment of that usufruct. It was admitted for the plaintiff that annuities given and charged upon land are vaild; but if the annuity equalled or exceeded the profits, there would be an effectual gift of all the profits and practically of the land, and yet it was contended that the possession and enjoyment of the land could not be directly given. Whether this interest and right of possession for years or life is called an estate or not, it as effectually excludes the general owner as an estate would. In the absence of any authority for so extraordinary a limitation of the right of property as would forbid a present parting with the exclusive possession and enjoyment for a time, their Lordships entertain no doubt that possession and enjoyment may be so dealt with, and that there is no objection to a similar interest being given by will.

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As to the second objection to the life-interest, namely, the uncertainty of the period at which it was to commence, that objection also exhausts itself upon the enjoyment of the usufruct more or less. The life-interest was to begin at once. It was subject to the devise to trustees, who were to receive the rents, allow the life-holder 2,500 rupees per month out of the net proceeds, apply the remainder in aid of the interest of the personalty, to pay off the legacies and annuities, and, when they were discharged, to allow the life-holder, if he survived so long, or, if not, the succeeding donees in succession to enjoy the whole. If the trust is not to be read to make estates valid which otherwise would be void, so neither is it to be read to defeat interests which without the trust would be valid. Their Lordships read this will, alike according to its words and substance, as giving a life-interest, subject to a charge for payment of legacies and annuities, whereby the rents over and above 2,500 rupees per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid. The law of perpetuity has no application to such a estate of things. There is not a single estate or interests in question which would not be vaild within the English law of perpetuity, assuming that upon the ground of public policy such law ought to extend to India, which the character of the law of gifts there seems to render unnecessary.

Whether Jotindromohun Tagore took not merely an interest for life but by construction of law an estate of inheritance, or whether such an estate of inheritance can be implied in favour of any of his successors, must next be considered. Upon this point it is unnecessary to repeat what has been already said as to the incompetency of an individual member of society to make a law whereby a particular estate created by him shall descend in a novel line of inheritance, different from that prescribed by the law of the land. It is clear that an estate in tail male, such as that which the testator has attempted to create in each series of limitations, is not authorized by Hindu Law. It could not exist with the terms of non-alienation attempted to be annexed to it, even in England. These would be rejected here as repugnant to a valid estate in tail male, created by sufficient words. The general intention to create a known

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estate of inheritance would be given effect to. The particular intention to deprive it of its legal incidents would be disregarded as an attempt to legislate. Accordingly it has been argued in support of the will, that as it shows an intention to give an estate of inheritance of some sort, all the machinery by which that estate was to be governed and dealt with after it was created ought to be rejected, and such an estate of inheritance, as the law would uphold and sanction, ought to be read out of the will, and conferred either upon Jotindromohun Tagore whose family was intended, so long as it produced males descended of males, to represent the estate described by the testator, by treating his life-estate as converted or expanded into an estate of inheritance, according to Hindu Law, or, at least upon his son to be begotten or adopted, as the first tenant in tail male, whereby the persons designated as heirs could take, though not in the fashion of the testator, at least somehow and to some extent. In order, however, to arrive at this conclusion, we must find a general and prevailing intention of the testator, expressed by the words of his will, which will be advanced by this process; and we are not at liberty to invent for him a will which will have the effect of creating an estate at variance not merely in details, but in substance and effect, with what he has said.

The proposed construction would contradict the will in every particular expressed therein. It would give the father a right of inheritance and a power of disposition when the will says that he shall only hold for life. Testing this alone by English precedents, it might, in order to give effect to a general intent, be sustained by *Nicholl* v. *Nicholl* (1). The proposed construction would give the succession from him to all his sons equally, where the will says that the eldest shall be preferred and have a separate estate of inheritance, and that until that estate fails, the second and so forth shall not succeed. Testing this alone by English precedents, it might plausibly be maintained by *Pitt* v. *Jackson* (2). The proposed construction would give succession to women, whom the will excludes. It would let in rights of maintenance which the will negatives. It would let in the power of alienation, which the will forbids. It would defeat the limitation in case of non-residence. It would

(1) 2 W. Bl., 1159. (2) 2 Brown, C. C., 51.

disregard the provisions as to leasing and improvement, which show, in common with the rest of the will, that the intention of the testator was to give and to give only such an inheritance as would keep together the property inalienable so long as a male descended in a male line from any of the indicated sources of inheritance should be in existence, and should keep up state in the family mansion. There is no trace to be found in the will of an intention to create any other sort of estate; and the will, as clearly as language can speak without express words, declares that it was not the intention of the testator that any person to take thereunder should have the estate of inheritance defined by the ordinary law. If the testator had used language to describe, however imperfectly or obscurely, such an estate as within his intention, effect ought to be given to that intention, when once arrived at by a fair and liberal interpretation of his language. To create such an estate by judicial construction of this will would be something worse than guess-work as to what the testator might have said if he could be asked his meaning; for it would be to contradict in every article what he has intelligibly expressed. These observations dispose of the case of *Humberston* v. *Humberston* (1) so much relied upon by Sir Roundell Palmer in his able argument to sustain this claim to a general estate of inheritance by construction, and also of the other authorities which show that, in order to give effect to the general intention of the testator, estates of inheritance will be inferred against the particular expression, in order to benefit as nearly as may be in a lawful way all whom the testator intended to benefit. To infer a general estate of inheritance in this case would at the same time defeat the testator's general intention, and benefit persons other than those he intended to benefit, against established principles of construction, and (again to refer for illustration to English law) against the authority of *Monypenny* v. *Dering* (2). Their Lordships are of opinion that no estate of inheritance other than the void estate in tail male can be read or deduced from the will.

There is, however, another point of view in which the estates in tail male may be regarded, namely, as intended, at all events, to confer an estate for life upon the first taker in existence when

(1) 1 P. Wms., 332.

(2) 2 De Gex, M. & G., 145.

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the will took effect. The intention of the testator to give at least a life-estate to the first taker is clear, and if an estate in tail male stood first in the will, effect might perhaps be given to that intention. There was, however, no person in existence to take an estate in tail male at the testator's death except Suttendromohun Tagore, and the validity of his claim to a life-interest in succession stands upon same ground as that of Sourendromohun Tagore and his son, whose position must next be discussed.

Upon this the question arises whether Sourendromohun Tagore, Promodecumar Tagore, and Suttendromohun Tagore take life-interests successively after that of Jotindromohun Tagore, or whether the interests attempted to be created in them fail by reason of the avoidance and rejection of the previous estates with which they were linked, and upon the failure or determination of which they were to arise. This may be considered in reference to Sourendromohun Tagore, as these other claimants in this respect stand upon a like footing. It may be urged that, as there was at the death of the testator no person to take under the first series of limitations, except Jotindromohun Tagore, and no person who came into existence afterwards could in point of law so take, there was in law a "failure" of the estates at the death of the testator, which no subsequent event could affect, and that the interest for life after the death of Jotindromohun Tagore then became vested in Sourendromohun Tagore. The answer is that this argument proceeds upon the assumption that "failure or determination" means failure or determination in law, as if the testator contemplated that his will might be void in law, which, as to the limitations in question, save as to the possible effect of a law against perpetuities, their Lordships see no sufficient ground upon the face of the will for supposing that he suspected. The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances, to be conferred.

If Jotindromohun Tagore shonld beget or adopt a son, and

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die leaving the son and Sourendromohun Tagore both surviving, either Sourendromohnn Tagore (and after him his son) must take at once and enjoy, to the exclusion of the son of Jotindromohun Tagore, in spite of the will; or the heir-at-law (who, though in terms excluded from benefit "under the will," cannot be excluded from his general right of inheritance, without a valid devise to some other person) must enter and enjoy during the life of Jotindro's son, and of his issue male, actual or adopted, and Sourendromohun Tagore (or his son), if he succeeded, must succeed, not as a link in the special chain of succession framed to keep together the family estate, but in turn with the heir-at-law whose intervention was not contemplated by the testator.

If Jotindromohun Tagore were to die leaving power to adopt a son who was afterwards, in fact, adopted, Sourendromohun Tagore would either enjoy absolutely to the exclusion of the son in spite of the will, or the heir-at-law would enter as before stated.

Many other cases might be supposed, in which the rights of Sourendromohun and those who claim after him, instead of forming part of a series of estates in successive devisees to fulfil the testator's intention by keeping up the estate and handing it on from one to another whilst there was a male representative of the selected line of limitation and descent, would become a a fitful and uncertain enjoyment in turns with the heir-at-law, according to whether there was or was not any person in existence who would, if by law he could, have been a prior taker under the will.

Their Lordships reject the conclusion either that the testator meant to give an uncertain interest of so strange and shifting a character or that there was an intention to give an absolute estate to precede the prior estates, in the event not appearing to have been contemplated by the testator of the prior estates being void in law. Their Lordships understand "failure or determination" to mean "failure or determination" in fact of an estate or estates which the testator considered sufficient in law, and that these limitations over were in the scheme of this will intended to follow the creation of the prior estates of inheritance and must fall therewith.

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Their Lordships are thus of opinion that a life-interest has been created in Jotindromohun Tagore, and that the estates of inheritance and subsequent estates or interests attempted to be created by the will have failed. The decision of the rights in the real estate involves the personalty settled therewith, which calls for no further remark.

There is, however, left the question how far the personalty not settled with the realty, but to be made into a distinct fund by the will after the legacies and annuities had been disposed of, ought to be dealt with; whether the bequest of the *corpus* is void, or whether the interest is to be enjoyed by the tenant for life so long as he can enjoy the realty.

The gift of the personalty, or rather of the fund in money and securities for money into which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities, was held absolutely void in the High Court (appellate Jurisdiction). The Chief Justice rejected the words "or persons" as insensible, because only one person could take the beneficial interest in the realty at the same time, and he treated the gift of the fund of money and securities for money as a gift of the *corpus* to an uncertain person who might be one of those who for failure of the estate in tail male cannot take the realty. Mr. Justice Norman declined to reject the words "or persons", and he suggested amongst others the construction that the person then in possession and his successors should take the entire income and profits without deduction, but he leant to the alternative, that it was uncertain whether the testator meant to make an absolute gift or only to give the interest in succession, *reddendo singula singulis*, and upon this ground he concurred in holding the gift to be void. The decree gives Jotindromohun Tagore the surplus of the interests remaining in the hands of the trustees after payment of the legacies and annuities and excludes him and his successors from any right to the subsequently accruing interest, which is hardly consistent. The intention of the testator, however, appears sufficiently clear to give effect to all the words as follows,—viz., that the surplus in the hands of the trustees, and the subsequently accruing interest of the personal fund, is to go in the same line and to the same "person or persons" as were in succession to take a beneficial interest in the realty

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in the same manner as the rents of the realty. The words "or persons, instead of being rejected as inconsistent with a gift of the *corpus*, ought rather to be taken as conclusive to show that the intention was to benefit persons taking successively, rendering to each his share of the interest. The word "person" in the singular is used in the clauses directing a conveyance of the real estate, although the conveyance was to be for the benefit of all the persons taking successively, because there was only one conveyance to be made for the benefit of all. The words "or persons" in the plural were proper in the clause directing the trustees, not to convey, but to stand "possessed of, and interested in the trust moneys and securities and the interest, dividends, and the annual proceeds thereof in trust" absolutely for the person or persons entitled under the limitations &c., to the beneficial or absolute enjoyment of the real property. And the use of the plural shows that one person was not to take all, but that several persons were to take, and they could only take in succession under the limitations in the will. The words "absolutely" and "absolute" are used not to indicate that the whole was to go over together, but that it was to be enjoyed free from the charges in respect of legacies and annuities. No person could be entitled to the "absolute" enjoyment of the real property under the will in the largest sense, and "absolute" is classed by the will with "beneficial," so as to have a distinct meaning as applied to each holder, whether for life or in tail male. The result, in their Lordships' opinion, is that after the legacies and annuities fall in and are satisfied, the intention was to establish a trust of a fund, consisting of money and securities, the interest of which should be paid to the person or persons for the time being successively entitled to the rents of the real estate, the *corpus* remaining otherwise undisposed of.

In this respect the decree ought, in the opinion of their Lordships, to be varied, and a declaration made of the right of Jotindromohun Tagore, not only to the surplus interest of the personalty until legacies and annuities fall in and are satisfied, but also to the interest of the personalty after such falling-in or satisfaction.

As to the plaintiff's claim to maintenance their Lordships

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adopt the conclusion arrived at in the High Court. Without entering into the general question as to how far the testamentary power as to ancestral property can supersede the claim to maintenance, it is enough to say that the claim in this case must be sustained, if at all, upon the footing that the marriage gift ought to be rejected. The plaintiff admits a marriage gift of his father of real property, producing at the time Rs. 7,000 per year, which, *primâ facie*, is an adequate maintenance. He does not state the present income. His averment of its insufficiency is not that it is in fact unreasonable or inadequate, but only that it is insufficient "considering the amount and value of the said Prosonnocoomar Tagore's property".

The amount of the property, doubtless, is an element in determining the sufficiency of a maintenance, but it cannot be regarded as the criterion. Other circumstances, and even the position or conduct of the claimant (speaking generally and not of the particular claimant), may reduce the maintenance. If the plaint were considered well founded in this respect, a son not provided for might compel a frugal father, who had acquired large means by his own exertions, to allow a larger maintenance than he himself was satisfied to live upon, and than children living as part of his family must be content with. The only question raised, therefore, is whether the obligation, moral or legal, of the father to provide a reasonable maintenance for his son, is satisfied by a marriage gift of a *primâ facie* adequate income, and their Lordships are of opinion that such a gift is in its character obviously a provision for maintenance which in this case must be regarded as sufficient, and in respect of which the plaintiff has laid no foundation for further inquiry, either in law or fact.

The plaintiff's claim to an account must next be considered. He takes nothing under the will. As heir-at-law he is entitled to so much of the inheritance in the real and personal property as is not exhausted by the valid provisions of the will, and he is entitled to the protection of the law to keep that inheritance intact, until he comes into its enjoyment. He has averred upon information and belief that the trustees "against the directions contained in the will" sold securities for money consisting of Government paper, "out of the *corpus* of the estate of the said

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testator, and have improperly applied the proceeds thereof." Issue was taken by the trustees upon this averment. In the High Court (original ordinary civil jurisdiction) Mr. Justice Phear considered this statement of the plaintiff insufficient, because "the trustees and executors are distinctly empowered by the will to pay debts and legacies out of the personalty, and the selling of the Government paper, of which the plaintiff complains, may, as far as anything goes which is stated by the plaintiff, have been effected for that purpose." The High Court (appellate jurisdiction), however, directed an account, thinking that an averment upon "information and belief" was sufficient as to a fact within the defendant's knowledge, and not within the plaintiff's, and that the statement as to the sale being "against the directions contained in the will," and of the proceeds being "improperly applied," was inconsistent with a due performance of the trust. In this latter view their Lordships concur, and hold that the plaintiff is entitled to the account decreed. Whether any further relief should follow must be decreed by the High Court upon the result of the account when taken.

Upon the question whether or not there ought to be made a declaration, beyond a mere expression of opinion, as to the rights of the parties after the life-interest of Jotindromohun Tagore, their Lordships are of opinion that such a declaration ought to be made. This case is distinguishable from *Lady Langdale* v. *Briggs* (1), where it was laid down that, generally speaking, it is not according to the course of the Courts in England to declare future rights, and it falls within the exceptions there contemplated as possible, in the judgment of the Lord Justice Turner, page 428; because all the existing parties interested are in Court, and it is impossible to decide the case without considering the whole scope of the will, and arriving at judicial conclusions as to the rights of each of the parties thereunder, which judicial conclusions, so far as they dispose or may dispose of the rights of those parties, ought to be incorporated in the decree.

As to costs, considering that the important questions litigated have arisen from the novelty and difficulty of the will, their Lordships are of opinion that the costs as between

(1) 8 De G. M. & G., 391.

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attorney and client of all parties in the Lower Court upon appeal to the High Court (appellate Jurisdiction) and of the appeals to Her Majesty in Council, ought to be paid out of the estate, taking first the *corpus* of the personal or moveable estate, and that future costs ought to be reserved until the taking of the account, and be then disposed of by the High Court.

Their Lordships will therefore humbly recommend to Her Majesty that the decree of the High Court (appellate Jurisdiction) be in part affirmed and in part varied, and that additional declarations of the rights of the parties should be made as follows: that is to say, that the said decree be affirmed so far as it orders that the decree of the Lower Court in its ordinary civil Jurisdiction be reversed, and that the plaint in this suit does show a cause of action, and that the testator died intestate as to certain portions of his property, and that part of the testator's immoveable property was ancestral estate, and that he had a right to dispose thereof by will, and that the plaintiff is not entitled to any maintenance from the estate of the testator, and that the plaintiff is entitled to an account as directed by the decree of the High Court (appellate Jurisdiction), and that as to the residue of the said decree, that the same be varied, and the following order and decree substituted for the same: that is to say, that the defendant Jotindromohun Tagore is beneficially entitled to a life-interest under the said will in the real or immoveable property, and also in the personal or moveable property vested in the trustees therein mentioned, and directed to be conveyed or converted into a fund respectively, subject to the payments therein directed to be made, and to the provisions of the will not hereby declared to be void, and also until the legacies and annuities fall in and are satisfied to receive Rs. 2,500 per month out of the net rents of the real or immoveable property, and also the surplus rents of the same and the unexpended surplus of the interest, dividends, and annual profits of the personal or moveable property which from time to time remain unexpended after the payments by the will directed to be made thereout, and also that, subject to the trusts for payment of the legacies and annuities, the said Jotindromohun Tagore is beneficially entitled for his life to use and enjoy the library, carriages, horses, farmyard, furniture,

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jewels, gold and silver plates, and other articles belonging to the said testator, except the jewels, household-furniture, and other articles which, at the time of the testator's death, was or were in the personal use of any member of the testator's family, which by the will are not, or were not, to be collected, or got in, or sold by the said trustees and executors; and that the limitations in tail male and subsequent limitations in the said will respectively have failed and are void; and that, upon the failure or determination of the life-interest of the said Jotindromohun Tagore, the plaintiff, subject to the provisions in the said will not hereby declared to be void, is entitled, as heir-at-law of the said testator, to the real and personal property in respect of the receipt and enjoyment of which the said life-interest is declared; and that upon the expiration of the said life-interest and subject to any trust not hereby declared void, the beneficial interest in the said real and personal property is vested in the plaintiff as such heir-at-law; and that the case be remitted to the Lower Court, with a direction that it shall try the seventh issue and return its finding thereon, with the evidence, to the High Court, (appellate Jurisdiction); and that the costs of the parties respectively in the Lower Court of the appeal to the High Court (Appellate Jurisdiction); and the costs of the several appeals to Her Majesty in Council be taxed as between attorney and client, and paid out of the estate, taking first the *corpus* of the personal or moveable property, and that the future costs, if any, be reserved and disposed of by the High Court (appellate Jurisdiction) upon the taking of the account by that Court directed.

Decree modified.

NOTE.—It is proposed in this note to deal briefly with only one of the various matters decided in this case, namely, that by the Hindu Law a person capable of taking under a gift or a will must, either in fact or in contemplation of law, be in existence at the date of the gift or the death of the testator.

The rule is deduced from a passage in the Dayabhaga, taken apart from the context. It is, however, firmly established, and it would serve no useful purpose to see whether it is capable of being legitimately deduced from the original authorities in Hindu Law. The words "or in contemplation of law" were evidently introduced in the enunciation of the rule to include cases of children, in embryo who afterwards come into separate existence, and children introduced into a family by adoption.

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This rule, which imposes a limit to the exercise of the power of disposition of property, takes the place of the rule of English law known as the rule against perpetuities which, it has been held, has no application in Hindu Law. The limits imposed by this rule are evidently much narrower than those laid down by the English rule; and it has been decided that the enactments contained in the Transfer of Property Act, section 14, and the Hindu Wills Act, section 2, which purports to make section 101 of the Succession Act incorporating with some modification the English rule against perpetuities applicable to Hindu wills, have not extended those limits: —*Ramlal Sett* v. *Kanailal Sett*, I. L. R. 12 Calc., 663; Alangamanjari v. Sonamani, I. L. R., 8 Calc., 637.

It should, however, be observed that, this rule of Hindu Law unlike the rule against perpetuities, has regard to actual events and not to possibilities :— *Bhaba Tarini* v. *Peary Lall*, I. L. R., 24 Calc., 646, and it has further been settled that a gift or devise, in favour of a class of persons some of whom would, by the operation of this rule, be incapable of taking would be supported as in favour of those who may take :—*Bhagabati Barmanya* v. *Kali Charan*, I. L. R., 32 Calc., 992.

It may also be noted that the Courts have not found it possible to avoid the operation of this rule to the case of dedication of property by will to a deity directed to be consecrated when the consecration was not effected during the lifetime of the testator,—*Upendra Lall* v. *Hemchandra* I. L. R., 25 Calc., 404.

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v.
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February, 1.

[*Reported in L. R., 6 I. A., 88; I. L. R., 5 Calc., 148.*]

The following judgment was delivered by

Sir James W. Colvile:—The question to be determined on this appeal is, what are the respective rights of the infant plaintiffs and appellants on the one hand, and of the respondents claiming as purchasers at an execution sale on the other, in an eight-anna share of mouzah Bissumbhurpore, a village situate in the district of Tirhoot. The material facts out of which this question arises are the following:—

Baboo Adit Sahai, the father of the plantiffs, became on the death of his father Nursing Sahai in1862, or by virtue of a subsequent partition effected with a c-oparcener, the sole owner of certain ancestral immoveable property in Tirhoot, including eight annas of mouzah Bissumbhurpore. It has been assumed throughout the proceedings that the case was governed by the law of the Mitakshara; that, or the Mithila law, which is the same in respect of the questions raised in the suit, being the general law of the district. He had afterwards two sons, who are the infant plantiffs. Of these, Ram Sahai was born in 1862, and Bhuggobutti in October, 1869. These dates were disputed, but have, in their Lordships' opinion, been conclusively established in the suit. On the 21st of January, 1870, Adit Sahai executed, in favour of one Bolaki Chowdhry, a defendant in the suit, though not a respondent on this appeal, an instrument in the form of a bond and Bengali mortgage, whereby he bound himself to repay the sum of Rs. 13,000, which he had borrowed from Bolaki, with interest at the rate of 15 per cent. per annum and pledged as security for such repayment the whole and entire proprietary shares owned and possessed by him in mouzah Surakdeeha (also part of the ancestral estate) and mouzah Bissumbhurpore. This bond does not expressly state any reason for incurring the debt, but it refers to a negotiation for a loan of a smaller sum from another party, which had fallen through, and says that that sum was not then sufficient to meet the payments of the obligor's several creditors. It was registered on the 21st of January, 1870.

**Present:*—Sir J. Colvile, Sir B. Peacock, Sir M. Smith and Sir R. Collier.

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On the 30th of December, 1872, Bolaki Chowdhry, suing on this instrument, obtained an *ex parte* decree against Adit Sahai alone for the sum of Rs. 16,901 13*a*. 3*p*., the amount due for principal, interest, and costs. The terms of this decree were in the usual terms of a decree in such a suit, viz., that the sum decreed should be realized by the sale of the mortgaged property, and that if the said property should not be found sufficient to meet the payment of it, the person and other properties of the judgment debtor should be held liable for it.

On the 21st of March, 1873, Adit Sahai presented a petition to the Court. This,—after stating that execution having been issued in the usual way, the mortgaged property had been ordered to be put up for sale; that on production of Rs. 3,000 out of the decretal amount the Court had granted time for one month, and postponed the sale to the 7th of April; that the petitioner was very ill, and would be ruined by a forced sale,—prayed the Court to grant a further postponement of the sale, and, under the provisions of the 243rd section of Act VIII of 1869, to appoint a *surbarakur* of the mouzahs in question, and certain other portions of the ancestral estate. From the order made on this petition it appears that the attachment of Bissumbhurpore had for some reason been already quashed, and that a new attachment was about to be made; and it was accordingly directed that in the meantime the petition should stand over. That second attachment must have been made, for subsequent proceedings in execution were had, in the course of which Binda Koer, the mother of Adit Sahai, claimed to be entitled in her own right to one anna of mouzah Bissumbhurpore, and to some part of the other property taken in execution. Her latter claim was allowed, but that affecting Bissumbhurpore was rejected; and the execution sale stood fixed for the 23rd of May, 1873, when, on the 19th of that month Adit Sahai died. The proceedings against Adit Sahai were thereupon revived in the usual way against his two sons as his heirs, and the 28th of July, 1873, was fixed as the day of the sale of the property liable to the execution. On the 14th of that month, however, Mussumat Suraj Bunsi Koer, as the mother and gurdian of the infant appellants, filed a petition of objections for the protection of their interests as the sons of, and therefore, under the

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Mitakshara law, the co-sharers with their father in his lifetime in the property; and the order passed on that petition was in effect that the objections could not be heard and decided in the execution department; but that if the petitioners had any interest in the property attached apart from and other than what their late father possessed, they could obtain their remedy by bringing a regular suit. The execution accordingly proceeded, the sale took place on the 28th of July, and the lot described as "the eight-anna share of the judgment debtor in mouzah Bissumbhurpore, part of the mortgaged property as per inventory of the decree-holder" was purchased by the Respondents for Rs. 6,600. The sale proceeding was ordered to be duly kept with the record. Whether the usual certificate was afterwards issued to the purchasers, or in what terms, if issued, it was expressed, does not clearly appear on the record; but it is certain that they had not been put into possession on the 27th of August, 1873, when the present suit was commenced.

That is a suit by the infant appellants, suing, by their mother and guardian, against the respondents as the purchasers of the eight annas of Bissumburpore at the execution sale, and also against Bolaki Chowdhry, the execution creditor. The plaint prayed for the adjudication of the right of the plaintiffs to, and the confirmation of their possession in the eight annas of Bissumbhurpore; to have the mortgage bond of the 21st of January, 1870, the *ex parte* judgment obtained by the defendant Bolaki thereon, the miscellaneous orders rejecting the plaintiffs' objections, and the auction sale of the 28th of July, 1873, set aside; and for an injunction to restrain the delivery of possession of the disputed property to the respondents. The claim to this relief was founded on the rights which, under the law of the Mitakshara, a son acquires on his birth in ancestral property, and the consequent limitation on the father's power to alienate, encumber, or waste that property; and the plaint contained the charges, usual in such cases, of immoral and extravagant conduct on the part of Adit Sahai.

The Subordinate Judge, by his judgment of the 27th of April, 1874, found for the plaintiffs on all the issues in the suit, and gave them a decree for the confirmation of their possession, and the cancellation of the bond of the 21st of January, the decree founded thereon, and the execution sale.

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He found in particular that there was no justifying necessity for the loan of the Rs. 13,000, or for the former loans in repayment of which part of that money was employed; that the balance of the money was not shewn to have been applied to family purposes; that Bolaki had failed in his duty to make *bona fide* inquiry into the necessity, but had lent without such inquiry the money to a man whom he well knew to be over head and ears in debt, and living a life of debauchery and sensuality; that consequently the *ex parte* decree was void of all legal force against the family state of which the debtor was but a joint owner; and that for the same reason the execution sale effected thereunder could not stand so far as the family property was concerned. He also held that the rights of the purchasers stood on no better ground than those of the execution creditor; that they were "not innocent purchasers in the proper sense of the term, since notice was given before the sale by the plaintiffs that the family property advertised for sale could not legally be sold for the debt of one of the joint members of the family."

On appeal to a Division Bench of the High Court the learned Judges, in their judgment of the 21st of July, 1875, said :—

"The Subordinate Judge has decided (in the words of the well-known case of *Hunooman Pershad* (1) that although the creditor would have been justified in advancing his money if he had made such inquiry as was open to him, and satisfied himself, as well as he could, as to the existence of the necessity, he did not in this case make such inquiry; or rather, perhaps, his words may be taken to mean that the result of any inquiry must have shown him quite clearly that the only necessity of Adit Sahai was his own improper and immoral way of life, which required the expenditure of funds not derivable from his regular income. And this decision would, we think, have been perfectly fair and right, were we dealing with Bolaki Chowdhry only; for he appears to have acted as the family *mahajun* for a long time previous, and must necessarily have been acquainted with Adit's circumstances and way of life."

The learned Judges, however, proceeded to rule that the

(1) 6 Moo. I. A. 421; 1 Pundit P. C. J. 552.

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purchasers (the respondents) stood on higher ground; that under the authority of the case of *Muddun Thakoor* v. *Kantoo Lall* (1), they were to be treated as strangers who had purchased at public auction for valuable consideration, and had bought on the faith that the decree, under which the sale was made was a proper decree, and properly obtained. In a subsequent part of their judgment they threw out that the *onus* of shewing against the purchasers that the decree was an improper one lay upon the plaintiffs; and that the evidence in the cause as to the habits and immoral conduct of Adit Sahai, though strong enough to support a decree against Bolaki Chowdhry, might not be strong enough to support one against the purchasers. The formal decree passed was that the decree of the Lower Court should be reversed, and the suit as against the purchasers, defendants, dismissed.

The result, then, of the judgment and decree under appeal is that the plaintiffs had established, as against the execution creditor, a case which, had he been the purchaser at the execution sale, would have entitled them to full relief against him; but that they had not established a title to any relief against the purchasers, the respondents.

The extreme contention on the part of the appellants is, that nothing passed or could pass to the respondents under the execution sale, because, on the death of the judgment-debtor before the sale, the whole of his interest vested by survivorship in his sons, leaving nothing upon which the execution could operate.

The extreme contention on the part of the respondents is, that the sale took effect on the whole of the mortgaged property, and passed the interest of the sons, as well as that of the father therein.

An intermediate proposition is, that the sale was operative upon the right, title, and interest of the judgment-debtor in the property put up for sale, so as to pass the share to which, upon a partition effected in his lifetime, he would have been entitled in eight annas of mouzah Bissumbhurpore.

The argument addressed to their Lordships make it desirable to consider, somewhat in detail, what are the principles of the Hindu Law which are the foundation of the plaintiff's claim,

(1) 14 B. L. R., 187; L. R. 1 I. A. 333.

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and what the rights which flow from them. These questions are of course determinable by the texts of the Mitakshara, as interpreted by judicial decisions either of the Courts of India, or of this Board; and it cannot be said that the course of decision has been altogether uniform and consistent.

That under the law of the Mitakshara each son upon his birth takes a share equal to that of his father in ancestral immoveable estate is indisputable. Upon the questions whether he has the same right in the self-acquired immoveable estate of his father, and what are the extent and nature of the father's power over ancestral moveable property, there has been greater diversity of opinion. But these questions do not arise upon this appeal. The material texts of the Mitakshara are to be found in the 27th and following *slokas* of the first section of the first chapter. It was argued at the bar that, because in the third *sloka* of the above section it is said that the wealth of the father becomes the property of his sons, in right of their being his sons, and that "that is an inheritance not liable to obstruction," their rights in the family estate must be taken to be only inchoate and imperfect during their father's life, and in particular that they cannot, without his consent, have a partition even of immoveable ancestral property. There was some authority in favour of this proposition, notwithstanding the texts to the contrary which are to be found in the Mitakshara itself (see *solkas* 5, 7, 8, 11, of the 5th section of 1st chapter). But it seems to be now settled law in the Courts of the three Presidencies that a son can compel his father to make a partition of ancestral immoveable property. On this point it is sufficient to cite the cases of *Laljeet Singh* v. *Rajcoomer Singh* (1) and *Raja Ram Tewary* v. *Luchmun Persad* (2), decided by the High Court of Calcutta; that of *Kaliprashad* v. *Ram Charan* (3), decided by the High Court of the North-Western Provinces; that of the *Na'galinga Mudali* v. *Subbiramaniya Mudali* (4), decided by the High Court of Madras; and the case of *Moro Vishvanath* v. *Ganesh*

(1) 12 B. L. R., 373.
(2) B. L. R. Sup. Vol. 731 ; S. C. 8 W. R., 15.
(3) I. L. R. 1 All. 159.
(4) 1 Mad. H. C. R. 77.

Vithal (1), decided by the High Court of Bombay. The decisions do not seem to go beyond *ancestral* immoveable property.

Hence, the rights of the co-perceners in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coperceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu law imposes upon sons (a question to be hereafter considered), and the fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate.

The right of co-parceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the Courts of India, and it cannot be said that there has been complete uniformity of decision respecting it.

All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the co-parceners, and that such an authority will be implied, at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether, in order to bind adult coparceners, their express consent is not required; but this is a question which does not arise in the present case.

To what extent an unauthorised alienation can be impeached by co-parceners is a more important question, and one upon which there has been a greater conflict of authorities. Nor can it be said that the same law even yet prevails in all parts of India upon it.

A distinction has been often made, both by Courts of Justice and by text-writers, between alienations by private contract and conveyance, and alienations under legal process, as in the case of joint family property seized and sold in execution of a decree against one member of the family for his separate debt.

Since the decision, however, of the cases of *Virasvami*

(1) 10 Bom. H. C. R. 444.

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Gramini v. *Ayyasvami Gramini* (1), *Peddamuthulaty others* v. *N. Timma Reddy* (2), *Palanivelappa Kaundan* v. *Mannaru Naikan* (3), and *J. Rayacharlu* v. *J. V. Venkataramaniah* (4), it has been settled law in the presidency of Madras that one co-parcener may dispose of ancestral undivided estate, even by private contract and conveyance, to the extent of his own share ; and *a fortiori* that such share may be seized and sold in execution for his separate debt.

That the same law now obtains in the presidency of Bombay is shown by the cases of *Damodhar Vithal Khare* v. *Damodhar Hari Soman* (5), *Pandurang Anandrav* v. *Bhaskar Shadáshiv* (6), and *Udaram Sitaram* v. *Ranu Panduji* (7). But it appears from the case of *Vrandavandás Ramdás* v. *Yamunabai* (8), and the cases there cited, that, in order to support the alienation by one co-parcener of his share in undivided property, the alienation must be for value. The Madras Courts, on the other hand, seem to have gone so far as to recognise an alienation by gift. There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family ; and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition ; see 1 Strange, Hindu Law. [1st Ed.] p. 179, and App. vol. ii. pp. 277 and 282.

In Bengal, however, the law which prevails in the other Presidencies as regards alienation by private deed has not yet been adopted. In a leading case on the subject, that of *Sadabart Prasad Sahu* v. *Foolbash Koer* (9), the law was carefully reviewed, and the Court, refusing to follow the Madras and Bombay decisions, held that, according to the Mitakshara law as received in the Presidency of Fort William, one co-parcener had not authority without the consent of his

(1) 1 Mad. H. C. R. 471.
(2) 2 Mad. H. C. R. 270.
(3) 2 Mad. H. C. R. 416.
(4) 4 Mad. H. C. R. 60.
(5) 1 Bom. H. C. R. 182.
(6) 11 Bom. H. C. R. 72.
(7) 11 Bom. H. C. R. 76.
(8) 12 Bom. H. C. R. 229.
(9) 3 B. L. R. F. B. 31.

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co-sharers, to mortgage his undivided share in a portion of the joint family estate, in order to raise money on his own account, and not for the benefit of the family. In another part of the same case, the Chief Justice intimated a doubt upon a question which did not then call for decision, viz., whether, under a decree against one co-parcener in his lifetime, his share of joint property might be seized and sold in execution. That question must now be taken to have been set at rest by the recent decision of this tribunal in *Deendyal Lal* v. *Jugdeep Narain Singh* (1), by which the law has so far been assimilated to that prevailing in Madras and Bombay, that it has been ruled that the purchaser of undivided property at an execution sale *during the life of the debtor* for his separate debt does acquire his share in such property with the power of ascertaining and realizing it by a partition.

But then the question arises, what is the consequence of the debtor dying before the execution is complete; whether in that event the co-parceners take his undivided share by survivorship, so as to defeat the remedy which the creditor would otherwise have against it.

This was much considered in the case of *Udaram Sitaram* v. *Ranu Panduji* already cited from the 11 Bombay H. C. Report, p. 76. There the debt was the separate debt of a son joint in estate with his father. The suit was brought, after the death of the son, against the father. A decree was obtained against the father and the son's widow, and it was sought, in a supplemental suit, to enforce that decree against the son's undivided share in joint property, treating that share as liable, in the father's hands, for the son's debt. It was ruled that this could not be done; that, though a son might be liable to pay his father's separate debts, there was no corresponding obligation on a father to pay his son's debts; that the right of a son to a share in the joint ancestral property had died with him; and that his share, having survived to the father, was no longer a subject upon which the execution could operate. This case is the more important, because the Court, whilst coming to the above decision, fully recognized the alienability of the share of one co-parcener, as established at Bombay; and showed,

(1) I. L. R., 3 Calc., 198; L. R. 4 I. A. 247; 3 Pundit P. C. J. 739.

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with some detail, how the remedy against such a share is to be worked out by the holder of a decree in the debtor's lifetime.

Mr. Mayne in his valuable Treatise on Hindu Law and Usage, section 288, states that there had recently been a decision to the same effect as that just stated at Madras. Indeed, this was stronger than that at Bombay, because the debtor had died after decree, though before execution. The case is cited as that of *Kooppookonan* v. *Chinnayen* (1), but their Lordships have been unable to obtain access to a copy of those Reports, and can refer only to the abstract of the case in Mr. Mayne's work. The Chief Justice in that case seems to have taken a distinction between a specific charge on the land and a mere personal decree. The existence of such a distinction would be the logical consequence of the power of a co-parcener, as recognized at Madras and Bombay, to sell or mortgage joint property to the extent of his undivided share.

In his judgment in the Bombay Case of *Udaram Sitaram* v. *Ranu Panduji*, (2), Chief Justice Westropp cites a decision of the High Court of the North-Western Provinces, *Goor Pershad* v. *Sheodeen* (3), which is still stronger than the last-mentioned case at Madras, because there the property had been actually attached in the debtor's lifetime.

It may be further observed that the Chief Justice, in the case already cited from 3 Bengal Reports (4), seems to have intimated an opinion in favour of the general rule that an undivided share in joint property cannot be followed in the hands of co-parceners to whom it passed by right of survivorship. It was not, however, necessary to decide the point in that case.

Their Lordships have hitherto dealt with the powers and rights of ordinary co-parceners. They have now to consider how far those rights and powers are qualified by the obligation which the Hindu Law lays upon a son of paying his father's debts. The obligation is thus succinctly stated by Chief Justice Westropp (5) :—

"Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes), the whole of the

(1) 1 Madras Reporter, 63.
(2) 11 Bom. H. C. R., 85.
(3) 4 N.-W. P. Rep. 137.
(4) 3 B. L. R. 31 (36) F. B.
(5) 1 Bom. H. C. R., 83.

family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather."

And as authorities for this proposition he cites Colebrooke's Digest, Book I., Chap. v., Par. 167, and *Girdhari Lall* v. *Kantoo Lall* (1). One of the earlier authorities cited at the bar upon this point was a case decided by the late Sudder Court of Lower Bengal in 1861, which is reported at p. 213 of the Decisions of the Suddur Dewannay Adawlut of Bengal for that year. In it an infant son sued by his guardian, in the lifetime of his father, to set aside various conveyances which had been made by the father of portions of the joint family estate, and to recover the property sold under them, and also to recover other portions of the estate which had been sold under orders of the Court in execution of decrees. The family was governed by the Mithila law, and the first point decided was that the restrictions on a father's power of alienation over ancestral immoveable estate under that law were the same as those imposed by the law of the Mitakshara.

This case recognized the distinction between alienations by conveyance and those made under process of execution. The Court set aside the sales by conveyance, because no justifying necessity for them had been established, and it did this although the considerations for the sales were in some instances money raised in order to satisfy either judgment or bond debts. On the other hand, it dismissed the suit so far as it sought to recover property which had been sold under decrees of Court, on the ground that the son was under an obligation to pay the debts of the father if not contracted for immoral purposes, and that he had failed in this case to prove, as against the purchasers under the decrees, that they were so contracted. The words of the judgment on this point are, "Freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts, under Hindu Law, can be successfully pleaded only by a consideration of the invalid nature of the debts incurred. Now we are clearly of opinion, that the plaintiff has been unable to show that the expenses for which these decrees were passed were, looking to the decrees themselves,

(1) L. R. 1 I. A. 321 : 3 Pundit P. C. J. 380.

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and we cannot now look beyond them, immoral, and such as, under Hindu Law, the son would not be liable for."

The decision of this tribunal in the before-mentioned case of *Muddu Thakoor* v. *Kantoo Lall*, (1) has, however, gone beyond this decision of the Sudder Dewanny Adawlut, because it treats the obligation of a son to pay his father's debts, unless contracted for an immoral purpose, as affording of itself a sufficient answer to a suit brought by a son either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or to recover property sold in execution of decrees of Court. The judgment, moreover, and this is the portion of it that is chiefly material to the determination of the present appeal, affirms the principle laid down in the judgment of the Sudder Dewanny Adawlut, that a purchaser under an execution is not bound to go further back than to see that there was a decree against the father; and that the property was property liable to satisfy the decree, if the decree had been given properly against the father. In such a case, one who has *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for it, is protected against the suit of the sons seeking to set aside all that has been done under the decree and execution, and to recover back the estate as joint ancestral property.

This case then, which is a decision of this tribunal, is undoutedly an authority for these propositions:

1st. That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and 2ndly, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings.

Their Lordships have now to apply the principles to be

(1) 14 B. L. R., 187; S. C., L. R., 1 I. A., 333.

extracted from the authorities which have been considered to the case before them.

It has been found by both the Indian Courts and, in their Lordships' opinion, properly found, that the plaintiffs, as between them and Bolaki Chowdhry, the judgemnt creditor of Adit Sahai, had established that neither they, nor the ancestral immoveable estate in their hands, were liable for the debt to Bolaki which had been contracted by their father. The two material issues on this point were, 1st, whether the bond to Bolaki, executed by the late father of the minors, was legally valid so far as the minors' interest is concerned, and whether the money thus borrowed was devoted to the satisfaction of debts incurred when the minors had no existence; and, 2ndly, what sort of a life did Adit Sahai live; did he spend the money borrowed from Bolaki Chowdhry in immoral purposes? The Subordinate Judge, upon a full consideration of the evidence, found both these issues in favour of the plaintiffs, and decreed to them the relief sought by their plaint. The judgment of the High Court does not impeach this finding as regards Bolaki Chowdhry. On the contrary, the words of the learned Judge who wrote the judgment of the Court are: "And this decision would, I think, have been perfectly fair and right were we dealing with Bolaki Chowdhry." There is no doubt a subsequent passage to the effect that the onus was clearly on the plaintiffs of showing against the respondents, who purchased at the execution, that the decree against Adit Sahai was an improper one, and that the evidence was insufficient to prove the fact.

If in this last passage of the judgment the Court meant to rule that the evidence which was sufficient to prove the two issues above mentioned, and the matters of fact involved in them against Bolaki Chowdhry was insufficient to prove them against the respondents, that ruling would, in their Lordships' opinion, be erroneous. The respondents were parties to the suit, they went to trial upon those issues, and had equally with Bolaki Chowdhry the means of cross-examining the plaintiffs' witnesses, and of adducing counter-evidence. This observation, however, leaves untouched the principal ground upon which the High Court dismissed the plaintiffs' suit as against the respon-

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dents, viz., that upon the authority of the decision of this Board in *Muddun Thakoor* v. *Kantoo Lall* (1), the respondents are to be treated on the footing of purchasers for value, without notice; for it is one thing to prove a fact, and another to prove that a particular party had notice of that fact. Their Lordships desire to say nothing that can be taken to affect the authority of *Muddun Thakoor's Case* (1), or of the cases which may have since been decided in India in conformity with it. The material passage of the judgment in *Muddun Thakoor's Case* (1) is in these words:—

"A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that if the decree was a proper one, the interest of the sons as well as the interest of the fathers in the property, although it was ancestral, was liable for the payment of the father's debts. The purchaser under the execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against the fathers; that the property was property liable to satisfy the decree, if the decree had been given properly against them; and he having inquired into that, and *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for it, the plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant."

It appears to their Lordships that the present case is clearly distinguishable from that of Muddun Thakoor, and does not fall within the principle laid down in the passage just cited. It has been seen that before the respondents purchased, the claim of the plaintiffs was preferred in the Court wherein the execution proceedings were pending in the form of objections to the sale. The Court refused to adjudicate upon the claim in an execution proceeding, and accordingly allowed the sale to take place, but made an order referring the plaintiffs to a regular suit for the establishment of their rights. Their Lordships think that the respondents must be taken to have had notice, actual or

(1) 14 B. L. R., 187: L. R. 1 I. A., 333.

constructive, of the plaintiffs' objections, and of the order made upon them, and therefore to have puchased with knowledge of the plaintiffs' claim, and subject to the result of this suit. It follows that, as against them as well as against Bolaki Chowdhry, the plaintiffs have established that, by reason of the nature of the debt neither they nor their interests in the joint ancestral estate are liable to satisfy their father's debt.

The question remains, whether they are entitled to any and what relief as regards the father's share in this suit? It seems to be clear upon the authorities that if the debt had been a mere bond debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it in the father's lifetime, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands. On the other hand, if the law of the Presidency of Fort William were indentical with that of Madras, the mortgage executed by Adit Sahai in his lifetime, as a security for the debt, might operate after his death as a valid charge upon mouzah Bissumbhurpore to the extent of his own then share. The difficulty is that, so far as the decisions have yet gone, the law, as understood in Bengal, does not recognize the validity of such an alienation.

Their Lordships are of opinion that it is not necessary in this case to determine that vexed question, which their former decisions have hitherto left open. They think that, at the time of Adit Sahai's death, the execution proceedings under which the mouzah had been attached and ordered to be sold had gone so far as to constitute, in favour of the judgment creditor, a valid charge upon the land, to the extent of Adit Sahai's undivided share and interest therein, which could not be defeated by his death before the actual sale. They are aware that this opinion is opposed to that of the High Court of the North-Western Provinces, in the case of *Goor Pershad* v. *Sheodeen* (1), already referred to. But it is to be observed that the Court by which that decision was passed does not seem to have recognized the seizable character of an undivided share in joint property which has since been established by the before-mentioned

(1) 4, N.-W. P. Rep. 137.

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decision of this tribunal in the case of *Deen dyal Lal* (1). If this be so, the effect of the execution sale was to transfer to the respondents the undivided share in eight annas of mouzah Bissumbhurpore, which had formerly belonged to Adit Sahai in his lifetime; and their Lordships are of opinion that, notwithstanding his death, the respondents are entitled to work out the rights which they have thus acquired by means of a partition.

They will, therefore, humbly advise Her Majesty to allow this appeal, and to reverse the decree of the High Court, and also that of the Subordinate Judge, which is clearly wrong in so far as it absolutely set aside the bond, the decree, and the execution sale, and in lieu thereof to make an order declaring that by virtue of the execution sale to them the respondents acquired only the one undivided third share in the eight anna share of mouzah Bissumbhurpore, in the pleadings mentioned, which formerly belonged to Adid Sahai, with such power of ascertaining the extent of such third part or share by means of a partition as Adit Sahai possessed in his lifetime; and ordering that the appellants be confirmed in the possession of the said eight-anna share of mouza Bissumbhurpore, subject to such proceedings as a respondents may take in order to enforce their rights above declared. The order should further direct that the costs in the Courts below be apportioned according to the usual practice of those Courts, when the party plaintiff is only partially successful. But the appellants, having succeeded here on the material portion of their claim, are entitled to the costs of this appeal.

NOTE.—The doctrine of a son's duty under the Hindu Law to pay his father's debts (excepting debts incurred for, what may for the sake of brevity be called, immoral purposes) was clearly recognised by the Privy Council in *Hunooman Persaud Panday's* case. The subsequent working out of the doctrine and its effect upon the other doctrine of the Hindu Law as expounded in the Mitakshara namely, the doctrine of the equality of the rights of the son and the father in ancestral property, appear from the present case and the late cases of *Nanomi Babuasin* v. *Modhun Mohen* (I.L.R., 13 Calc., 21) and *Bhagbut Persaud* v. *Girja Koer* (I. L. R., 15 Calc., 717).

It may be noted that the only cases of private alienation by the father which their Lordships of the Judicial Committee regard as binding on the sons are alienations made, in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt; and a consideration, of the doctrine on which the father's power of alienation is based namely the son's obligation to pay off the father's debt, would show that it must be so. Certain cases decided by the Indian High Courts, however seem to regard the existence of an antecedent debt as immaterial.

(1) I. L. R., 3 Calc., 198; L. R., 4 I. A., 321.

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v.
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March, 11.

[*Reported in L. R., 26 I. A., 153 ; I. L. R., 21 All., 412.*]

The following judgment was delivered by

LORD HOBHOUSE:—There are no facts in dispute in this case. The plaintiffs, now appellants, brought the suit to establish their title as reversionary heirs of Madho Singh as against the first defendant, a boy who was adopted by him in the Dattaka form. The boy is the natural son of Madho's mother's sister. The sole question is whether the adoption of such a relation is allowed by Hindu Law. The Subordinate Judge held that it is not allowed. A Full Bench of six Judges of the High Court has decided that it is allowed. Four judges, *viz.*, Edge C. J., and Knox, Blair and Burkitt, JJ., being of that opinion, against Banerji and Aikman, JJ., who are of the contrary opinion. Their Lordships are under the disadvantage of hearing the case without any help from the respondents, who have not appeared. But this disadvantage is much lessened by the elaborate fulness of the reasons assigned by Edge, C. J. for the conclusion which he reached in favour of the respondent.

The question is of the same nature as that which has just been disposed of in the preceding cases from Madras and Allahabad. But it depends upon a different set of texts, and the course of decision in India has been very different. It is agreed on all hands that the prohibition contended for, extends only to the three twice-born classes, and not to the most numerous class of all, the Sudras. The parties here are Kshatriyas, governed by the Benares School of Law. It is also agreed that as regards capability to be adopted, the sons of sisters, sons of daughters, and sons of maternal aunts, stand on the same footing, and that the authorities which apply to any of these classes apply to all.

The oldest original texts bearing on the point are contained in the Dattaka Chandrika. In Sec. I., Para. 11 of that work the author quotes the ancient sage Sakala to the following effect. After mentioning certain relatives to whom preference should be given in adoption among the regenerate tribes, he says :

* *Present :* Lords Hobhouse, Macnaghten, and Morris and Sir Richard Couch.

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"If such exist not, let him adopt one born in another family except a daughter's son and a sister's son and the son of the mother's sister."

In Para. 17 of the same section, the same work quotes the sage Saunaka, who, after pointing out from what classes adoptions should be made, says: "But a daughter's son and a sister's son are affiliated by Sudras. For the three superior tribes a sister's son is nowhere mentioned as a son."

In Sec. II, Paras. 7 and 8, after quoting from Saunaka the expression that the adopted boy should bear the reflection of a son, the author adds: "The resemblance of a son, or in other words the capability to have been begotten by the adopter, through appointment and so forth."

Nanda Pandita, the author of the Dattaka Mimamsa, writing in the early part of the 17th century, some centuries later than the conjectured date of the Dattaka Chandrika, gives the same quotations from Sakala and Saunaka, and similar comments upon them. (Sec. II., Arts. 74, 107, 108; Sec. V, Arts. 16 to 20).

Their Lordships have mentioned in the prior adoption cases the views of Knox, J. as to the authority of the two Dattaka treatises just quoted. In the present case the learned Chief Justice Edge takes even more disparaging views of their authority; denying, if their Lordships rightly understand him, that these works have been recognised as any authority at all in the Benares School of Law. If there were anything to show that in the Benares School of Law these works had been excluded or rejected, that would have to be considered. But their authority has been affirmed as part of the general Hindu Law, founded on the Smritis as the source from whence all Schools of Hindu Law derive their precepts. In Doctor Jolly's Tagore Lecture of 1883, that learned writer says: "The Dattaka Mimansa and Dattaka Chandrika have furnished almost exclusively the scanty basis on which the modern law of adoption has been based." Both works have been received in Courts of law, including this Board, as high authority. *Ranggma* v. *Atchama* (1). Lord Kingsdown says: "they enjoy, as we understand, the highest reputation throughout India." In 12 Moore, p. 437, Sir James Colvile quotes with assent the opinion of Sir William Macnaghten,

(1) (1846) 4 Moo. I. A. 97; 1 Pundit P. C. J. 313.

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that both works are respected all over India, that when they differ the Chandrika is adhered to in Bengal and by the Southern Jurists, while the Mimansa is held to be an infallible guide in the Provinces of Mithila and Benares. To call it infallible is too strong an expression, and the estimates of Southerland, of West and Bühler seem nearer the true mark; but it is clear that both works must be accepted as bearing high authority for so long a time that they have become embedded in the general law.

The learned Chief Justice then objects that the texts of the two Rishis are detached from their context, and so are rendered of no value; and that as regards Sakala there is no information where the writer of the Chandrika obtained his text, and that its genuineness is doubtul. This objection is strengthened by the fact that the greatest of the sages do not mention any such prohibition; neither Manu nor Vashistha, nor Yajnavalkya, nor Narada; while one ancient sage, called the holy Yama, expressly asserts the right to adopt a sister's son. Those objections must receive the same answer. It may be true, though it is impossible now to say, that the Dattaka Chandrika is the sole authority for the texts there quoted and afterwards copied by Nanda Pandita; but it still remains the fact that the texts have been so quoted for several centuries, and have so been received into the body of Hindu Law.

Taking, then, the texts as they are given, and adding to them such weight as the commentators possess, what is enjoined by them? The learned Chief Justice points out that Saunaka may mean a legal prohibition, or a moral admonition, or merely to state a fact, or to indicate a preferance for daughters' and sisters' sons among Sudras. Certainly, if the question were new, the learned judge's argument would have to be carefully weighed before it could be rejected. Much of the reasoning which has prevailed with their Lordships in the prior cases would apply to this case; and, on some points, such as the silence of other great lawgivers and the existence of a sacred text in an opposite sense, with greater force. But their Lordships find an antecedent difficulty: for they have to consider whether the present question can be treated as an open one.

It is not necessary to state in detail the course of decisions

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in India, because there is hardly any conflict in them, and they are fully stated in the judgments below. In 1808 there was a decision on a case from Mirzapore in favour of the validity of these disputed adoptions; but it is probable that the parties were Sudras, as Sir William Macnaghten thought they were. There was a decision in 1810 between Brahmans, where an adoption of a sister's son was held valid. But Sir Francis Macnaghten tells us that it was over-ruled in some subsequent proceeding which is not specified. In every other case that has since occurred, when the question has arisen between members of the three regenerate classes, and the adoption has been in the Dattaka form, the decision has been against its validity. The cases have occurred in all parts of India, and all the High Courts have agreed. In making this general statement, their Lordships have not overlooked the case decided by the Bombay High Court in 1867 (1). Edge, C. J., considers that, though the parties really were Sudras, the learned Judges thought they belonged to one of the twice-born classes, and so lent their authority to an adoption of a mother's sister's son among one of those classes. But though there was some argument as to the true caste, their Lordships find nothing in the judgment to shew that the Judges thought the caste to be other than it really was. Nor was the decision treated as standing in the way of a subsequent decision in 1879 by the same High Court, which affirmed the invalidity of such marriages in the regenerate classes.

The arguments by which the learned Chief Justice seeks to withdraw this case from so strong a current of decision rest entirely on the peculiarity which, in his opinion, attaches to the Benares School of Law. He does, indeed, subject the decided cases to a minute and able examination, with a view of ascertaining the precise bearing of each, and of attenuating its force. But the general result at which he arrives does not substantially vary from that which is arrived at by the minority of the Court, and which is above stated. That being so, he puts the case in this way :—

"The parties in this case are Kshatriyas, and are governed by the Benares School of Hindu Law. As Kshatriyas they belong

(1) See *Ganpatra Virshvar* v. *Vithoba Khandappa*, (1867) 4 Bom. H. C. R. 130.

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to one of the three regenerate classes of Hindus. What we have to ascertain is, does the Hindu Law, as accepted by the Benares School, prohibit the adoption by a Kshatriya of the son of his mother's sister, in the sense of making such an adoption illegal and void."

"It has not been suggested that there is any evidence in this suit of any usage in these provinces by which the adoption in the Dattaka form of the son of a sister of the mother of the adopter, or of his sister's son or of his daughter's son, amongst any of the three regenerate classes is either recognised as vaild or prohibited as illegal. Neither side in this case has pleaded or relied upon any custom or usage."

The learned Chief Justice then ties the plaintiffs down to the the obligation of shewing a custom to prohibit the adoptions in question; and on each dicided case he puts the test question whether it is founded on proof of such a custom among the regenerate classes governed by the Benares School of Law. In the position he considers that he is supported by a passage in the judgment of this Board delivered by Sir James Colvile in the case of the *Collector of Madura* v. *Mootoo Ramalinga* (1), It is as follows: "The duty, therefore of a European Judge who is under the obligation to administer Hiudu Law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For under the Hindu system of law clear proof of usage will outweigh the written text of law." The principle deduced by the learned Chief Justice from this passage and applied to the present case would have very far-reaching consequences; and in their Lordships' opinion it is not a sound principle, nor is it properly deducible from the language of this Board.

In that judgment Sir James Colvile was dealing with the question whether a widow could adopt a son to her husband without his express authority. That is a point in the law of adoption on which legal authorities in different parts of India, all starting from the same sacred texts, have branched off into an extraordinary variety of conclusions; each marked enough

(1) (1868) 12 Moo. I. A. 397; 2 Pundit P. C. J. 361.

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and prevalent enough in its own sphere to be ascribed to some recognised school of law. Sir James Colvile addresses himself first to shew how these schools came into being, and, secondly, to specify books of the highest authority in them. It is in the course of this exposition that the sentences just quoted occur, as also the opinion before quoted with reference to the authority of the Dattaka Chandrika and of the work of Nanda Pandita. The decision of the Board was that the power claimed for the widow was conferred on her by the school of law dominant in Dravida country, from whence the appeal came. But that law was ascertained by the usual methods of ascertaining general law; by reference to authoritative text-books, to judicial decisions, and to the opinions of Pandits. These authorities were found to be sufficient proof of the general Hindu Law prevailing over large tracts of country and populous communities. Anybody living among them must be taken to fall under those general rules of law unless he could shew some valid local, tribal, or family custom to the contrary. It was necessary for this Board to refer to the differences of schools of law, because the authorities of the recognised Bengal School denied the power which those of Southern India affirmed. The whole passage is framed with reference to the fact that different schools were found to take different views of the general law on the point before the Board. But their judgment gives no countenance to the conclusion that in order to bring a case under any rule of law laid down by recognised authority for Hindus generally, evidence must be given of actual events to shew that in point of fact the people subject to that general law regulate their lives by it. Special customs may be pleaded by way of exception, which it is proper to prove by evidence of what actually is done. In this case the learned Chief Justice tells us that there is no suggestion of a special custom. That being so, he seems to have inverted the processes by which law is ascertained.

The rule of law asserted by the plaintiffs in this case is derived in the first place from the sacred texts which underlie all Hindu Law; and, secondly from books of high authority in the Benares School as well as in others. It has been affirmed by Courts of justice in all parts of India, and in many law suits in which the parties were subject to the law of the Mitakshara,

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which is of the highest authority in the Benares School. It has been so affirmed and applied in general terms, and not as confined to a particular school. It is not shewn or even asserted that there is anything peculiar in the Benares School to make this rule inconsistent with its principles. It seems to their Lordships that to put one who asserts a rule of law under the necessity of proving that in point of fact the community living under the system of which it forms part is acting upon it, or defeat him by assertions that it has not been universally accepted or acted on, would go far to deny the existence of any general Hindu Law, and to disregard the broad foundations which are common to all schools, though divergencies have grown out of them.

Their Lordships do not inquire whether the views so earnestly maintained by the learned Chief Justice upon the construction of the disputed texts might have been successfully maintained at the beginning of this century. For eighty or ninety years there has been a steady current of authority one way, in all parts of India. It has been decided that the precepts condemning adoptions such as the one made in this case are not monitary only, but are positive prohibitions, and that their effect is to make such adoptions wholly void. That has been settled in such a way and for such a length of time as to make it incompetent to a Court of justice to treat the question now as an open one. Their Lordships will humbly advise Her Majesty to reverse the decree appealed from, and to restore that of the Subordinate Judge, with costs in both courts, The respondents must also pay the costs of this appeal.

Appeal allowed.

NOTE.—The cases from Madras and Allahabad referred to in this judgment are *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshamma*, and *Radhamohun* v. *Beni Prasaud* which were decided together and where it was held that the adoption of a child who is the only son of his natural father is valid. The cases are reported in I. L. R., 21 All., 460.

BHUGWANDEEN DOOBEY
v.
MYNA BAEE.*

14th March 1868.

[*Reported in 11 Moo. I. A. 487; 9 W. R. P. C. 23.*]

Judgment was delivered by—

The Right Hon. Sir JAMES W. COLVILE.—

The following are the undisputed facts upon which this appeal arises :—

Rae Deenanath, a Hindoo Banker, of great wealth, carrying on business at Benares, Hyderabad, and other places, died at Benares on the 7th of June, 1855, childless. He was separate in estate from his brethern, if he had any; his wealth is said to have been self-acquired; and consequently his co-heiresses, according to the Hindu Law of the Benares School, were his two widows, *viz.*, the respondent and Doola Baee, since deceased. Immediately after his death, however, a document, purporting to be a will executed by him in favour of one Hunwunt Pershad, to whom jointly with a person named Bithul Pershad, it gave the management of the property, was propounded. The title of Hunwunt Pershad, claiming under this alleged will, or as the adopted son of Rae Deenanath, has since been litigated in the Indian Courts, which have uniformly pronounced against it. An appeal to Her Majesty in Council against their decisions is pending *(a)*, but it has not yet been set down for argument, in consequence of the death of one of the parties; and for the purposes of this appeal it must be assumed that Rae Deenanath died childless and intestate, and that the claim of Hunwunt Pershad was unfounded. Nor would it be necessary to refer to that claim but for the arguments which the appellant's counsel have founded on the partition between the widows, which was in some measure caused by it, and upon the alleged collusion of the respondent with the claimant.

The first consequence of the claim was that a summary suit, under Act, No. XIX of 1841, to determine the right to the

Present :—The Right Hon. Sir *James William Colvile*, the Right Hon. Sir *Edward Vaughan Williams*, the Right Hon. Sir *Richard Torin Kindersley* and the *Lord Justice Rolt*.

(a) Mussamat Lutchmee v. *Bhugwandeen.*

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immediate possession of the property, was instituted in the name of Doola Baee, who was then a minor, by her uncle and guardian, in which a curator was appointed under that Act. When this suit came to a hearing the Judge pronounced against the will, and directed that the whole estate of Rae Deenanath should be equally divided between the widows, and that the curator should carry out that order without delay. The property was thereupon divided; each widow was put in possession of her share; and Doola Baee continued in the separate possession and enjoyment of her share up to the time of her death.

She died on the 10th of November, 1857, having on the 21st of August, 1857, made a will which was registered on the same day, whereby she disposed of her share of the property, inherited from her husband, in favour of her father (the appellant) and her infant brother, Kaloo Ram, who is also represented by the appellant on this appeal.

Some steps seem to have been taken by the respondent, and also by Hunwunt Pershad, to resist the registration of this will in the lifetime of Doola Baee; and upon her death the respondent applied for the attachment of the property in dispute, being that taken by Doola Baee under the partition, as specified in the list before referred to; and for the appointment of a curator under Act, No XIX of 1841. Her application having been dismissed by the Judge, who on that summary proceeding upheld Doola Baee's will, she commenced the regular suit out of which this appeal has arisen, on the 21st of December, 1857, in the Court of the Principal *Sudder Ameen* of Benares.

The issues settled in the suit were :—

First, whether there was any informality in the institution of the suit.

Second, whether the plaintiff (the respondent) was legally competent to institute it.

Third, whether Doola Baee was a minor or not at the date of the alleged execution of the will.

Fourth, whether the will was fraudulent or a *bonâ fide* instrument.

Fifth, if a person die leaving two widows, and one of the widows subsequently dies leaving a will who is entitled to

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succeed according to the *Shastras*, the surviving widow or the legatee of the will (supposing the husband's estate to have been divided between the widows, and also supposing no such division to have been made)? And is a widow competent to make a will in favour of her brother and father under the *Shastras*?

The third and fourth issues may be dismissed from consideration. Both have been found by the Courts below in favour of the appellant, and the correctness of this finding is not now impeached.

Upon the other issues the Principal *Sudder Ameen* found—*first*, that the respondent could not maintain her suit, because it was brought on grounds wholly inconsistent and irreconcileable with the averments made by her in the suit, under Act, No. XIX of 1841, wherein she had supported the claim of Hunwunt Pershad; *secondly*, that by reason of the partition, Doola Baee was fully competent to leave her property to whomsoever she pleased; and accordingly he dismissed the suit with costs.

There was an appeal to the *Sudder* Court at Agra. The first judgment of that Court was adverse to the finding of the Principal *Sudder Ameen* on the first and second issues, and decided that the respondent, notwithstanding her former acts and averments, was competent to maintain the suit. But holding, that Doola Baee was competent to dispose of the inheritance derived from her husband, when it had been distinct and divided, and had effectually done so, it dismissed the appeal. It treated her power to dispose of the movable property as certain; her power to dispose of the immovable property as more open to question.

The respondent applied for a review of this judgment. The nature of her application and the proceedings upon it will have to be more particularly considered hereafter. The result of it was, that the case was re-heard before a Full Bench, when the Court decided that according to the law of the Benares School, Doola Baee was incompetent to dispose of either the movable or immovable property which she had inherited from her husband, and made a decree in favour of the respondent. The present appeal is against that decree.

From the foregoing statement it is obvious, that the principal question between the parties is the broad and general one,

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whether, according to the law of the Benares School, a Hindu widow is competent to dispose, by will or deed of gift, of either movable or immovable property inherited from her husband, to the prejudice of his next heirs.

The learned counsel for the appellant have, however, contested the right of the respondent to have the present case decided on his issue upon various grounds. They contend, *first*, that, if not precluded for maintaining the suit by reason of her acts and averments in former proceedings, as ruled by the Principal *Sudder Ameen*, she has so shaped her case on the pleadings, that she cannot in this suit insist on her rights whatever they may be, as next heir of her husband in succession to Doola Baee; *secondly*, that it was not competent to the *Sudder* Court, having regard to the application for review and the proceedings thereon, to review its first decision, except as to the immovable property.

Two other points were taken at the Bar, which it will be convenient to consider after, rather than before the determination of the principal and general question of Hindu Law. One was raised by Mr. Leith on behalf of the respondent, and was to the effect that, as one of two Hindu widows taking as co-heirs to their husband, she is in a more favourable position than that of a person claiming as next heir of the husband in succession to a single widow deceased.

The other, which was taken by the other side, is what was the effect of the partition, either by way of enlarging the power of Doola Baee to dispose of the property, or effecting the right of the respondent to question her disposition. Their Lordships will consider all these questions in their order.

At the close of the argument for the appellant they intimated, that in their judgment the respondent was not precluded, either by her acts or averments, or by her form of pleading in this suit, from insisting on her rights as heir of her husband against the claims of Doola Baee. Their Lordships agree generally in that part of the first judgment of the *Sudder* Court, which ruled that the respondent, because she originally acquiesced in the title set up by Hunwunt Pershad, had not lost any rights which accrued to her as one of the co-heirs of her husband, when that claim was decided to be untenable. Nor do they think

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that her alleged alienation of her share can be urged against her by the appellant as a bar to the present suit. It may have been an improper act; it may be one which Doola Baee, had she been the survivor of the two widows, could have questioned, or which the next heirs of Rae Deenanath may yet question; but the improper alienation of part of her husband's estate cannot affect the respondent's right to recover other parts of it from those who, if her view of the law is correct, have no title to it.

And upon the argument founded on the pleadings their Lordships have to observe, that the plaint does not inaccurately state the respondent's claim to the right to succeed, on the death of Doola Baee, to that property which the latter took by inheritance from her husband. The replication and the petition of appeal from the decree of the Court of first instance are no doubt more open to the objection taken. In order to meet the case of quasi-estoppel set up, they attempt to draw a distinction between the claim to the original share which the respondent took on her husband's death, and her claim to that to which she became entitled on Doola Baee's death; and make some confusion as to the character of her heirship. But this mispleading has in no decree prevented the settlement of proper issues, or prejudiced the fair trial of the real question of right between the parties; and that being the case, it would be contrary to the practice of their Lordships to give effect to nice and critical objections founded on the inaccuracy of an Indian pleading.

The next question is, whether the decree now under appeal ought to be reversed, so far as it affects the movable property, merely on the ground that it was not competent to the *Sudder* Court to review its prior decree, with respect to that portion of the property in question in the suit.

Their Lordships are not satisfied that the proceedings on review were not within the powers of the *Sudder* Court. Two objections have been taken to them—*first*, that the respondent never petitioned for a review of judgment, except as to the immovable property *next*, that whatever was the scope of her petition, the order of Mr. Gubbins upon it, must be taken to have conclusively confined the review to the immovable property.

Upon the first point their Lordships think, that the

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application for review must, on a fair construction of it, be taken to embrace the question as to the movable as well as that relating to the immovable property. The first plea seems to be confined to the latter; but the second plea is more general. It insists that the opinion of the Calcutta *Pundit* ought to be accepted as correct. That opinion made (as he himself stated in his second opinion) no distinction between movable and immovable property, but denied the right of the widow to dispose of either, to the prejudice of her husband's heirs.

Again, as regards the acts of the Court: the article of the Code of Procedure which is supposed to have tied the hands of the Judges is the 378th. It is clear, however, that the final order contemplated by that section was the order which, in the ordinary course, would have been made by Messrs. Ross and Pearson on the 15th of January, 1863. The proceeding of Mr. Gubbins was merely his fiat for the issue of that notice to the opposite party, which is required by the proviso of that section.

It may be admitted that Mr. Gubbins understood the application to be limited to the immovable property; that he so limited the notice; and that when the parties were together in presence before Messrs. Ross and Pearson, the written grounds for review impugned the correctness of the decision, so far as it related to the real property only. But the question still remains, whether it was not competent to the Judges, by whom the order allowing or rejecting the application for review was to be made, to enlarge those grounds on the oral application of the party, if satisfied that there was a proper case on the merits for so doing. There seems to be nothing in the Code of Procedure which expressly prohibits them from so doing. And their Lordships are of opinion, that Messrs. Ross and Pearson, though they might have made a final order, granting or rejecting the application *in toto*, or in part, were not incompetent to make the qualified order which they did make, leaving in the Court which was to review the decision, a discretion as to the extent to which the review should be carried.

They are also of opinion that, even if the Court below

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had been wrong in its procedure, its miscarriage ought not to prevent this Committee from deciding the question touching the disposition of the movable estate on its merits. There has been no surprise. The question was fully argued before the Full Bench of the *Sudder* Court on ample notice to both parties. It has been fully argued here. The objection, therefore, is purely technical, and the result of yielding to it might be to place the respondent at a very unfair disadvantage. She had a right to appeal to Her Majesty against the whole or any part of the first decree of the *Sudder* Court. She would not have lost that right of appeal even if she had limited her application for a review to the immovable property. She was relieved from the necessity of appealing by obtaining a final decree in her favour as to the whole of the property, whether movable or immovable. If this objection were to prevail, there could be no final determination of the question as to the former or its merits; unless, indeed, for the sake of doing substantial justice between the parties, their Lordships were now to allow her to appeal against that portion of the first decree of the *Sudder* Court. They are of opinion, that no such formality is necessary; and that it is competent to the respondent, who has been brought here on appeal, to maintain, if she can, the decree which is under appeal, by showing that it is right upon the merits.

Their Lordships being, therefore, of opinion, that there is no obstacle to the determination on this appeal, and between these parties, of the general question involved in the judgment under appeal, will now address themselves to the consideration of that question.

The parties have brought together a large amount of conflicting authority concerning it, consisting partly of the *Bywustas*, or opinions of *Pundits*, partly of decided cases, and partly of passages from ancient or modern authorities, which are accepted as authoritative in the Courts of India.

It is impossible to reconcile the various opinions of the *Pundits* which are to be found in the Record. They are divisible into three classes—namely, *first*, that of opinions taken in other suits; *secondly*, that of opinions taken by the parties themselves for the purposes of this suit: and *thirdly* that of opinions given in answer to the questions put by the *Sudder* Court in this suit.

Of the first class are No. 10 of the Record—probably No. 11 of the Record—No. 33 and No. 28 of the Record. Three of these are not very material. As far as they go, the first two support the contention of the respondent; the third seems to be good law, but it has really no bearing on the question now under consideration. The point was, whether on the death of the widow, the daughter or a nephew should succeed to property derived from the husband; and inasmuch as the widow could not have taken the property if it had not been divided, it followed that it must continue to descend in the course of succession to separate estate; and, therefore, to a daughter before a nephew. The fourth is strong against the right of a widow to alienate immovable property inherited from her husband; and the case in which the opinion was taken was decided in accordance with it. But the opinion being apparently that of the same Calcutta *Pundit* who was consulted in this case, it is material only as showing that he has in other cases rejected the doctrine that a widow has power to dispose of land inherited from her husband.

The second class consists of No. 12 of the Record, being the opinion of thirty-seven Benares *Pundits* filed by the respondent; and of No. 14 of the Record, being the opinion of twenty-one *Pundits* of the same place, filed by the appellant. The first ruled that the surviving widow was entitled to succeed to the share of the deceased widow; and that that right could not be defeated by the disposition of the deceased widow. The other goes the length of contesting the right of one widow to succeed to another widow of her deceased husband in any case; it affirms the proposition that the property being once vested in the widows, each had an absolute interest in her share, and might dispose of it as she pleased. It held also, that in the case of intestacy, the father and brother of the deceased widow would have been the persons entitled to inherit her share.

The third class consists of No. 4 of the Record, being the opinion of Ram Nath, one of the *Pundits* at *Sudder* Court of Agra; of No. 7 of the Record, being the opinion of the four Benares *Pundits*, taken by the Judge of that place, under orders from the *Sudder* Court at Agra; No. 5 of the Record, and No. 3 of the Record being the two opinions of Heerna

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Nund, the other *Pundit* at the *Sudder* Court of Agra; and No. 6 of the Record, and No. 2 of the Record, being the two opinions of the Calcutta *Pundit*. All these, except the latter opinions of Heerna Nund and the Calcutta *Pundit*, which were taken on the proceedings in review, were given in answer to the questions put by the *Sudder* Court before its first judgment.

The questions were prefaced by the following preamble, or statement.

A dies, leaving two wives *B* and *C*, who inherit his property real and personal. *B* and *C* make a complete partition of the property, and live separately from each other. *C* dies, having as blood-relations a brother and an uncle; and the questions were :—

First. Does the property left by *C* descend by inheritance to the other widow, *B*, or to the brother or uncle of *C*?

Second. Would *C* be competent to bequeath by will to her blood-relatives the share of the property which she inherited from *A* (so divided), to the prejudice of *B*, who is still living?

It will be observed that this statement assumes a complete partition by the act or contract of the two widows, and it sudstitutes an uncle for the father of the deceased widow. The only variation in the references to the different *Pundits* was that, from accident or design, that to Heerna Nund was confined to real property.

To these questions the four Benares *Pundits* answered :— *First*, that the brother of *C* was her foremost heir, and after him her uncle, and that while these two existed *B* could not succeed. *Second*, that any testamentary disposition by the widow of the property which she had inherited from her husband should be held valid, the property having been exclusively her own, and that she was, therefore, at liberty to dispose of it in any way she thought proper.

Three out of the four consulted *Pundits*, appear to be included amongst the twenty-one, who had previously given the opinion above referred to at the instance of the appellant, and accordingly the two opinions are, as might be expected, to the same effect; except, perhaps, that the second does not deny so strongly as the first the right of the surviving widow to succeed to the share of the deceased widow in any case.

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The answer of Ram Nath to the first question was, that C's share would descend by inheritance to *B*, because *C* could not be succeeded by her brother or uncle during the existence of her husband's *sapinda*; and although, in his answer to the second question, he admits the power of *C* to defeat this right of *B* by her will, he rests that power of disposition solely on the partition assumed by the statement. He says expressly:—"She could not have done so had the property been jointly held." He makes no distinction between real and personal estate.

The answers of Heerna Nund and the Calcutta *Pundit*, upon which the ultimate judgment was in great measure grounded, was, of course, in favour of the respondents on both points. They, too, make no distinction between real and personal property. The first opinion of Heerna Nund was confined to real property; but this, as he explained in his second opinion, was because the reference to him was so confined.

The following, then, is the result of the *Bywustas* of the *Pundits*:—If the partition, the effect of which will be afterwards more fully considered, were out of the question, all the Court *Pundits* would agree in holding, that the respondent, as the next heir of her husband, is entitled to take by succession the share of Doola Baee; and that that right cannot be defeated either as to movable or immovable property, by the will of Doola Baee. Ram Nath, however, holds that by reason of the partition, Doola Baee acquired the right of disposition. Again the twenty-one or twenty-two Benares *Pundits* who are in favour of the appellant's title are opposed by the twenty-seven *Pundits* of the same place, who have given their opinion in favour of the respondent. And the *Bywustas* given in other cases are more favourable to the respondent than they are to the appellant.

The Benares *Pundits*, who are in favour of the appellant refer only generally to the Mitácshará, but the particular passages on which they rely are probably the 1st and 11th sections of the second chapter, and especially the second article of the 11th section. Those passages, and the arguments in favour of the widow's right of disposition which were deduced from them, were lately under the consideration of this Committee in the case of *Mussamut Thakoor Deyhee* v. *Rai Baluk Ram* (1). The

(1) 11 Moo. I. A., 139. at p. 175.

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following is the conclusion to which their Lordships then came :—"The result of the authorities seems to be that, although, according to the law of the Western Schools the widow may have a power of disposing of movable property inherited from her husband, which she has not under the law of Bengal, she is, by the one law, as by the other, restricted from alienating any immovable property which she has so inherited; and that on her death the immovable property, and the movable, if she has not otherwise disposed of it, pass to the next heirs of her husband." To the authorities then cited and reviewed by their Lordships may be added Sir W. Macnaghten's observations in his work on "Hindu Law," Vol. I, pp. 19 to 21; Cases XIV and XV in the Second Volume of the same work, pp. 32 and 37; and also some of the cases which will hereafter be mentioned, which, whilst they support the doctrine of the widow's power to dispose of movable property, admit that she cannot dispose of immovable property inherited from her husband.

It must, then, be taken upon the authorities to be settled law that under the law of Benares, a Hindu widow has not the power to dispose immovable property inherited from her husband to the prejudice of his next heirs; and the only question open to doubt is, whether she has any such power over movable property.

It must be admitted that, in favour of this supposed disinction there appears at first sight to be a considerable body of positive authority. In the case of *Cossinauth Bysack* v. *Hurroosoondury Dabee* (1), the leading case upon the rights and disabilities of a Hindu widow in Bengal, it was at first supposed that the distinction was recognized even by that School. The first decree in that case declared the widow entitled to an interest for life in the immovable, and to an absolute interest in the movable estate of her late husband. That was altered by the decree made in a bill of review, which declared her entitled to the real and personal estate of her husband, to be possessed, used, and enjoyed by her as a widow of a Hindu husband, dying without issue, in the manner prescribed by the Hindu Law. On an appeal from that decree the whole subject was reviewed by Lord Gifford. His judgment (which is reported

(1) Morley's Dig. 204—5, 214.

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in the Appendix to Mr. Longueville Clark's Rules and Orders), whilst it establishes that, according to the law of Bengal, there is no distinction between movable and immovable property in respect to the widow's power of disposition over it, seems to proceed on the ground that the treatises known as the Vivada Chintàmani and the Ratnàcara are overruled and qualified in this respect by the Dayabhaga and Dayatutwa, which gave the law to Lower Bengal, and that where the two former treatises prevail the distinction may exist. This judgment, therefore, affords some ground for the argument that the law of Bengal, which does not recognize the distinction, is an exception from the general Hindu Law. Again, in *Rajundernarain Rae* v. *Bijaigobind Sing* (1), decided here in 1839, the right of the widow to dispose of movable property inherited from her husband, and its devolution on her dying intestate, are treated as open questions under the law of the Mithila School.

Of decided cases affirming the distinction, we have that in the High Court of Bengal, which was cited at the Bar from the Indian Jurist of the 31st of March, 1866, p. 128; and which appears to be a case governed by the law of the Mithila School. We have further the four cases cited in the judgment in that case, of which two show that the distinction has been recognized by the *Sudder* Court of Madras as prevailing in the Presidency of Madras; and two show that it has also been recognized by the High Court of Bombay as prevailing in that Presidency. And, lastly, we have Case VII, at p. 46 of the Second Volume of Sir W. Macnaghten's "Hindu Law," in which the law which ought to have been applied was that of the Benares School.

If it were clear that the law upon the point in question was necessarily the same for all parts of India except those Provinces of Lower Bengal which are governed by the Dayabhaga, these cases might afford ground for saying that the doctrine under consideration, however questionable originally, must be taken to be now established by a course of decisions.

Is however this uniformity of the law to be presumed?

The Judges, indeed of the High Court of Calcutta, say, in the judgment just referred to, "This case comes from Tirhoot,

(1) 2 Moo. I. A., 181.

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one of the Districts forming the ancient Province of Mithila, but the law is admitted'y the same in this particular both for Mithila and for the provinces governed by the Mitacshara." Their Lordships, however, are not satisfied that this statement is correct.

The Mitácshará is no doubt accepted as a high authority by all the schools, even by that of Bengal, when it is not controlled by the Dayabhaga, and other treatises peculiar to that school. But the other four schools have, like that of Bengal, though in a less marked degree, their particular treatises and commentaries which control certain passages of the Mitácshará and give rise to the differences between those Schools. In proof of this, it is only necessary to refer to the preliminary remarks of Sir William Macnaghten, pp. 21 to 23. From these it would appear that, whilst the Mithila School follows implicitly the Vivada Chintámani and the Ratnácara; the South of India the Smriti Chandrika and the Madhavya; and the Presidency of Bombay the Vyavahár Mayûkha; these works are by no means held in equal estimation at Benares.

Now, it appears from the judgment of Lord Gifford, that the works which were supposed to go furthest towards establishing the distinction between movable and immovable property, which is now under consideration, were the Vivada Chintámani and the Ratnácara. These may well be taken to establish such a distinction, according to the law of Mithila, and yet fail to do so according to the law of Benares. Again, the Mayúkha is cited as an authority for the decision of the case, at p. 43 of the Second Volume of Macnaghten's "Hindu Law." And, in the judgment under appeal, it is expressly stated that that treatise is not accepted as an authority, by the Benares School; and, consequently, that the case in question was not binding on the Court. In like manner the law established by the two decisions at Madras, if it be so established, may depend on treatises and authorities peculiar to the South of India, and not accepted at Benares. From the reports of these, at p. 117 of the *Sudder* Decisions for 1849, and at p. 77 of the *Sudder* Decisions for 1850, it appears that both were decided on the Bywustas of *Pundits*. In the former case the authorities relied on by the *Pundits* are not given;

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but in the latter, mention is made of the books called Madhaveyen and Saraswativilása as well as of the Mitacshara (there called Vijnyaneswara); and it appears, from Sir William Macnaghten's remarks, that the two latter works are of paramount authority in the territories dependent on the Government of Madras, whilst they are not enumerated amongst the works accepted at Benares.

If this be so, it follows that, even if the above-mentioned cases were correctly decided, they are by no means conclusive on the present question. The decision of the High Court of Calcutta, in so far as it confirmed the title of the purchaser of the Government Promissory Notes, might have been rested on the general law relating to the transfer of negotiable paper, and that case, so far as it involved the question now under consideration, and the case in the Second Volume of Moore's Indian Appeal Cases, were determinable by the law of Mithila; the two cases in the High Court of Bombay, and the Case, No. VII, at p. 46 of the Second Volume of Macnaghten's "Hindu Law," were decided according to the peculiar law of the Bombay Presidency, including the Mayúkha; and those at Madras according to the law of that Presidency. None of them necessarily govern a case to be decided according to the law of Benares.

How then does the law stand independently of these decisions?

The startling differences of opinion amongst the *Pundits* show that the question cannot be taken to be clearly settled by the authorities accepted at Benares.

The text of the Mitácshará on which, as has already been shown, the appellant must mainly rely, is the second paragraph of section XI of chapter II, which includes "property which she may have acquired by inheritance" in the enumeration of women's peculiar property. These words make no distinction between movable and immovable property; yet it is settled, beyond all question, as we have already stated, that the immovable property which a woman inherits from her husband cannot be disposed of by her, and does not pass as her *stridhun*. The legitimate inference from this seems to be, that neither movable nor immovable property inherited from her husband forms part of a woman's *peculium* or *stridhun*. Sir William

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H. Macnaghten, indeed, ("Hindu Law," Vol. I, p. 38), excludes from *stridhun* all the different kinds of property enumerated in the last clause of the paragraph in question.

On the other hand, it may be argued that the text is explicit; that it includes under the head of *stridhun* all property inherited from the husband; that from the fact of its inclusion the power of disposition over it is *primâ facie* to be inferred; but that the right to alienate immovable property, whether inherited from the husband or given by him in his lifetime, having been taken away by positive texts, the distinction in this respect between movable and immovable property has arisen.

This argument, however, would fail to show why immovable property, inherited from a husband, should not (and all the decided cases show it does not) descend as *stridhun*; but passes, on the widow's death, to the next kin of the husband. The truth seems to be, that the texts which restrict a woman's power of disposition over immovable property given to her by her husband in his lifetime, are different from those which both restrict her power over immovable property inherited from her husband, and regulate the course of devolution.

To the former class belongs the text of Narada: "Property given to her by her husband through pure affection, she may enjoy at her pleasure after his death, or may give it away, except land or houses"; and the text of Katyáyana: "What a woman has received as a gift from her husband she may dispose of at pleasure after his death, if it be movable; but as long as he lives, let her preserve it with frugality." To the second class belongs the text of Katyáyana, on which the judgment under appeal so much proceeds, *viz.*, "The childless widow preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate or property until she die; after her the legal heirs shall take it." We take these texts as rendered by Colebrooke, Dig., Vol. III, p. 575 and 576.

It is impossible to deny, as will be seen on reference to the Digest, that there has been a considerable conflict of opinion amongst the commentators concerning the texts. The better opinion, however, seems to be, that they relate to different subjects.

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Again, the latter text certainly includes both movable and immovable property; and it seems to be only by reason of confounding the law as to property given by, with that relating to property inherited from the husband, that the words "after her the legal heirs shall take it" can be restricted to the immovable portions of the husband's estate. The preponderance of authority is certainly in favour of the proposition that, whether the widow has or has not the power to dispose of inherited movables, they, as well as the immovable property, if not disposed of, pass on her death to the next heirs of the husband.

It is also worth remarking, that the doctrine that property inherited from her husband forms part of a woman's *stridhun* receives no countenance from two of the treatises current in other Schools which are supposed to recognize the widow's power to dispose of movables so inherited. Both the Vivada Chintámani and the Mayukha confine *stridhun* within the definitions of Menu and Katyáyana. They exclude property inherited, and the other acquisitions which are comprehended in the last clause of the paragraph in the Mitácshará, but are excluded by Sir W. Macnaghten.

They have distinct chapters for "the separate property of women," and "her right of succession to a husband who leaves no son." The Vivada Chintámani expressly says (p. 262), that the text of Katyáyana does not refer to the peculiar property of a woman; and although it cites from Katyáyana, "Let a woman on the death of her husband enjoy her husband's property at her discretion," and explains "that this refers to property other than immovable," it also, at page 292, quotes from the Mahábhárata: "For women the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husbands' wealth;" to which it adds, by way of explanation, "Here waste means sale and gift at their own choice." (*See* Vivada Chintámani, pp. 256 and 266, and Mayukha, pp. 84 and 78).

Another argument against including the wealth inherited from her husband in a woman's *stridhun*, as defined by the 2nd clause of the 11th section of the 2nd chapter of the Mitácshará, may be derived from the clauses 11 to 25 (both inclusive) of the same section. These declare the husband to be, in default

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of the issue, the heir to "the whole property as before described, cl. 11." This is intelligible, if the words "property which she may have acquired by inheritance," in the second clause, are considered to be property inherited in her husband's lifetime, or from some persons other than him.

The reasons for the restrictions which the Hindu Law imposes on the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land. The more ancient texts importing the restriction are general. It lies on those who assert that movable property is not subject to the restriction to establish that exception to the generality of the rule. The diversity of opinion amongst the Benares *Pundits* is sufficient to show, that the supposed distinction between movable and immovable property is anything but well established in that School. And the unanimous judgment of the five Judges of the *Sudder* Court, supported by the opinion of the Court *Pundits*, has, in this case, ruled that the distinction does not exist. Such a judgment ought not to be lightly over-ruled.

Their Lordships, therefore, have come to the conclusion that, according to the law of the Benares School, notwithstanding the ambiguous passage in the Mitácshará, no part of her husband's estate, whether movable, or immovable to which a Hindu woman succeeds by inheritance, forms part of her *stridhun* or particular property; and that the text of Katyána, which is general in its terms, and of which the authority is undoubted, must be taken to determine—*first*, that her power of disposition over both is limited to certain purposes; and, *secondly*, that on her death both pass to the next heir of her husband. They have already stated the grounds on which they think that the cases decided in India are not necessarily in conflict with those conclusions. It is unnecessary for them to express any opinion touching the correctness of those decisions; except that, in so far as they proceed—as that in the High Court of Calcutta unquestionably does in part proceed—on a different construction of the passage in the

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Mitacshará, they cannot be supported on that particular ground.

Their Lordships have now to consider, whether the effect of the so-called partition was to give Doola Baee any power of disposition over her share which she would not otherwise have had.

The case is wholly distinguishable from those in which a widow, having a right to an ascertained share upon a partition with coparceners, who have an absolute interest in their shares, is put by them into possession of that share. In such case it may be a question, whether her interest does not become absolute; though in a case coming from Lower Bengal the contrary was decided by this Committee on an appeal from the Supreme Court of Calcutta. But here the so-called partition was between two widows, each having the limited interest of a Hindu widow in her husband's estate. It does not appear that it was made at the suit or on the application of either. It was made by order of a Judge who, in the particular proceedings (one under Act, No. XIX of 1841), had no jurisdiction to determine questions of title; and who could only deal with the right to possession. It is difficult to see how such a partition could enlarge either widow's estate, so as to give her a disposition which she would not otherwise have had against the next heirs of her husband.

It may be said, that the question here is only, whether the respondent has not, by her partition, lost her right by survivorship. There is, however, no proof of any contract to make a partition, and, as part of that contract, to release the rights of survivorship, supposing it to have been competent to the widows to enter into such a contract. There was, as has already been shown, no jurisdiction in the Court to make a complete partition in *invitam*. The transaction seems to have been merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected. The acquiescence of the widows in the Judge's proceedings cannot have done more than bind each not to disturb the other's possession.

If this be so, it follows that the opinions of those *Pundits* which were given in favour of the appellant, on the assumption of a complete and regular partition, lose much of their power. It follows also, that the case of the respondent is stronger than it

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would have been had she claimed merely as next heir to her husband in succession to Doola Baee. For the estate of two widows, who take ther husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property, to the exclusion even of daughters of the deceased widow (1). They are, therefore, in the strictest sense, coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other. And, accordingly, this case might have been decided in favour of the respondent on this ground alone.

Upon the whole, then, their Lordships are of opinion, that the decree under appeal is substantially right, and ought to be affirmed. Considering, however, that what has here been decided in respect to Doola Baee's interest is equally applicable to that of the respondent, and that the latter is said to have assumed a power of disposing of her own share, they think it may be well to insert in the decree a declaration, that the property recovered by the respondent is to be possessed and enjoyed by her as a widow of a Hindu husband dying without issue, in the manner prescribed by the Hindu Law. Their Lordships will humbly recommend Her Majesty, with that variation, to confirm the final decree of the *Sudder* Court of Agra. The appellant must pay the costs of this appeal

Appeal dismissed with costs.

NOTE.—This case establishes that, according to Benares School of Hindu Law governed by the Mitakshara no part of her husband's estate, whether movable or immovable, to which a Hindu widow succeeds by inheritance forms part of the *stridhun* or peculiar property, so that she takes only a restricted estate and her power of disposition is accordingly limited. It also follows that on her death, the estate passes not to the heirs of her own peculiar property, but to the heirs of her husband. The result, therefore, is that the discussion contained in the Mitakshara, wherein the author maintains that the expression '*stridhun*' has no technical meaning, but should be deemed to include property, inherited by a female, as well as other descriptions of property specially enumerated as such, can have no practical effect given to it, since it neither affects the right of alienation nor controls the line of succession. The rule laid down in this case has been extended to other females. Accordingly the daughter has been held to take a restricted estate in property inherited from her father (*Chotay Lal* v. *Chunnoo Lal*, I. L. R., 4 Cal., 744); a similar rule has been laid down in the case of a mother inheriting from her son (*Jullessur*

(1) 2 W. B. Macnaghten's "Hindu Law," p. 38. note 1.

v. *Uggur*, I. L. R., 9 Calc. 725); and more recently it has been held that even in the case of property inherited by a female from another female the same rule applies. (*Sheo Shankar Lal* v. *Debi Sahai*, I. L. R., 25 All., 408; *Sheo Pertab* v. *Allahabad Bank*, I. L. R., 25 All., 476).

The case also establishes that when several widows inherit their husband's property together, they take a joint estate with the right of survivorship among themselves.

THE COLLECTOR OF MADURA

v.

MOOTTOO RAMALINGA SATHUPATHY.*

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May. 21.

[*Reported in 12 Moo. I. A., 397; 10 W. R., P. C., 17.*]

Their Lordships' reserved judgment was pronounced by

Sir James W. Colvile:—The principal question raised by these appeals is the validity of an adoption made by the widow of the last male *zemindar of* Ramnad.

His title to that *zemindary*, which is of great extent, and, like many of the large *zemindaries* in the south of India, in the nature of a *Raj*, or Principality, descendible to a single heir, was thus derived. In 1795, the then *zemindar*, Moottoo Ramalinga Sathupathy, having rebelled against the Government of the East India Company, was deprived of his *zemindary*, which in the month of July in that year was granted to his sister, Ranee Mangalaswara Natchear. Her title was confirmed by a formal *Sunnud*, executed on the 22nd of April, 1803, by Lord Clive, the then Governor of Madras, which granted the *zemindary* to her, her heirs, successors, and assigns. She was married to Ramasamy Taver, who died some time between 1797 and 1804; and in the latter year, Ranee Mangalaswara Natchear, then a widow, and professing to act under a written agreement between her and her late husband, adopted one Annasamy, his nephew, whose title she afterwards confirmed by a will executed on the 11th of April, 1807. She died in that year, and was succeeded by Annasamy. He had seven wives, of whom only his chief wife, Mootoo Veroyee Natchear, and the appellant, Ranee Kunjara, need be mentioned, but had no male issue by any of them. And on the 26th of January, 1820, he adopted a son, Ramasamy, who was the natural brother of Mootoo Veroyee Natchear, and, by a testamentary instrument of that date, confirmed that adoption, stating it to have been made "by himself and his chief wife Mootoo Veroyee Natchear unanimously." He died in February,

**Present*:—The Right Hon. Lord Westbury, the Right Hon. Lord Romilly (Master of the Rolls), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

1820, and was succeeded by Ramasamy, who died in 1830, without male issue, but leaving a widow, the respondent, Ranee Parvata Natchear, and two infant daughters, Mangalaswara and Dorarajah surviving him. It is unnecessary to notice the unsuccessful suits by which the titles of Annasamy and Ramasamy were impeached during their lives, though some of the proceedings in them help to swell the voluminous record before their Lordships. The title of Ramasamy to the *zemindary*, as stated above, is the common ground of all the parties to this litigation, and, on the consideration of these appeals, must be taken to be incontestable.

On the death of Ramasamy, without male issue, his successor in the *zemindary*, according to the course of succession *ab intestato*, was his widow. He had, however, two days before his death, addressed to the Collector, as the representative of Government, the *arzi* of the 19th of April, 1830. In that document, after stating that he was suffering from small-pox, and that the issue of his illness was uncertain, he expressed himself as follows:—"I have made an arrangement that my mother, Ranee Mootoo Veroyee, who is my guardian in every respect, and who holds chief right to this *zemindary*, should enjoy this *zemindary* and all other things; pay *peishkist* to the *Cirkar*; maintain my royal wife, my daughter, Mangalaswara, of five years old, and her younger sister, a small child; and when these children shall attain their proper age, to make an arrangement with regard to their right to the *zemindary*, and continue the same; that my natural brother, Mootoo Chella Taver, should manage the affairs of the *zemindary* until my children shall attain their proper age; and I have issued necessary orders for the strict observance of the above arrangement."

The affairs of the *zemindary* seem to have been managed under this arrangement between 1830 and 1840. The respondent, Ranee Parvata Natchear, is said to have been herself very young at the date of her husband's death; her children were infants; and the mother-in-law was probably the only member of the family with any capacity for business. In 1840, Magalaswara, the daughter of Ramasamy, who had previously been married, died after giving birth to a male child, who did

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not survive her. About that time differences arose between Ranee Parvata Natchear and her mother-in-law who appears to have set up some claim to the *zemindary* in her own right. The Board of Revenue, acting as court of Wards, intervened; appointed, in April, 1840, Ranee Parvata Natchear guardian of Dorarajah, her infant daughter, in the place of Mootoo Veroyee; and assumed the management of the estate, treating apparently Dorarajah as *defacto zemindar*, either by virtue of the *arzi* executed by Ramasamy, or by reason of Ranee Parvata Natchear's waiver of her rights in favour of her infant daughter.

Dorarajah died on the 24th of September, 1845. She had previously been married, and having no children, attempted on the day before her death, to adopt as a son a child, named, Anandai. By the document, called her will, she declared, however, that this person would only be entitled to the *zemindary* in succession to her mother, Ranee Parvata Natchear, whom she calls "the chief heiress to the *zemindary*. This adoption was communicated to the Collector by a letter of the 23rd of September, 1845, but was treated by him as invalid under the 25th section of Mad. Reg. V of 1804, because made by a disqualified landholder without the consent of the Court of Wards. The right of Ranee Parvata Natchear to the *zemindary*, as heiress either to her husband or to her daughter, was, therefore, recognized by the Revenue authorities who, in April, 1840, put her in possession of it as a qualified proprietor, and relinquished the management of it to her.

In the meantime, and ever since 1840, Mootoo Veroyee had been engaged in active litigation with Ranee Parvata Natchear and others for the enforcement of her alleged rights to the *zemindary*. The proceedings in her last suit are set forth in the record. For the most part they have no bearing upon any of the questions which their Lordships have now to determine; and it is unnecessary to notice any of them, except the supplemental rejoinder, which was filed by Ranee Parvata Natchear on the 6th of March, 1846; and the *Razenamah*, or agreement of compromise, by which this litigation was terminated on the 26th of February, 1847. In the former Ranee Parvata Natchear asserted, apparently for the first time, a right to

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adopt a son to her husband, either under an alleged authority from him, in the event which had happened, of both his daughters dying without issue, or under the more general power of adoption which is disputed on these appeals. By the latter, Mootoo Veroyee, in consideration of the provision made for her and her foster-son, Sevasamy, declared that Ranee Parvata Natchear might thenceforward enjoy the *zemindary* for ever; and, besides, might adopt a son at her pleasure, as specified in the supplemental rejoinder.

It is clear, therefore, that whatever obscurity and confusion there may be in the history of the *zemindary* and its management between the death of Ramasamy in 1830, and the month of May, 1847, Ranee Parvata Natchear was at the last-mentioned date in undisputed possession as *zemindar* of Ramnad.

In that state of things she made the adoption which is the subject of the present dispute on the 19th of May, 1847, she gave notice to the Collector of her intention to adopt her sister's younger son, and invited him to be present at the ceremony. On the 24th of the same month she formally adopted the respondent, Ramalinga. It is admitted that all the requisite ceremonies were duly performed, and that the adoption cannot be impeached, except on the ground of the insufficiency of her power to make one. The Board of Revenue, by an Order, dated the 10th of March, 1849, declared that the adoption was invalid, and that on the death of Ranee Parvata Natchear the *zemindary* would escheat to Government. On the 23rd of July, 1855, the Madras Government set aside this order, and determined to recognize the adoption until it should be declared invalid by a decree of a Civil Court. But on the 29th of October, 1855, the same Government cancelled its former order, and confirmed the order of the Board of Revenue of the 10th of March, 1849; and caused this, its final determination, to be intimated to Ranee Parvata Natchear through the Collector, by a letter dated the 15th of November, 1855.

The first of the suits out of which these appeals arise (No. 3 of 1856) was instituted in that year by Ranee Kunjara, claiming, as the last surviving wife of Annasamy, and her daughter Mangalaswara, against Ranee Parvata Natchear alone. They

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impeached the validity of the adoption, insisted that on Ranee Parvata Natchear's death Ranee Kunjara, as the next in succession, would be entitled to the *zemindary* and claimed maintenance in the meantime. Ranee Parvata Natchear, by her answer, alleged that Ranee Kunjara was not the wife but the concubine of Annasamy and could have no title to the *zemindary*. Various persons afterwards intervened under different titles, and were all by supplemental plaint, made parties-defendants to this suit. But none of them, except the respondent, Ramalinga, and the Collector are parties to these appeals, or have any interest therein.

The second of the two suits (No. I of 1860) was brought, in February of that year, by the respondent, Ramalinga, who had then attained his majority, against Ranee Parvata Natchear and the Collector. Against the latter it sought to have the before mentioned Order of intimation of the 15th of November, 1855, set aside as illegal; and against the former it prayed that immediate possession of the *zemindary* might be adjudged to the respondent, Ramalinga.

The second suit was the first heard, and by his decree, dated the 18th of March, 1861, the Civil Judge ordered that the order of the Collector of the 15th of November, 1855, and his orders to certain subordinate officers therein referred to, should be cancelled; and that, as he had failed to establish any right to the estate, or to invalidate the acts of Ranee Parvata Natchear in respect to it, he should abstain from all further interference; and that Ranee Parvata Natchear, subject to the provisions of Hindu Law, and Section 8 of Mad. Reg. XXV of 1802, might, without the previous consent of the Collector, or of any other authority, assign and transfer to the plaintiff (the respondent, Ramalinga), or whomsoever she might think proper, by sale, gift, or otherwise, her proprietary right in the Ramnad *Zamindary*. The decree further declared, that it was to be without prejudice to the Collector's right to bring a regular suit for the estate, if he conceived that the Government had a superior title to the party in possession, but it prohibited him from summarily seizing it as an escheat whilst there were heirs.

The decree, made by the same Judge in the first suit, bore

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date the 12th of April, 1861. It found that Ranee Kunjara Natchear was one of the wives of Annasamy, but that as such she had no right to succeed to the estate after Ranee Parvata Natchear, being only her step-mother and, therefore, excluded from inheriting: it further decreed that the *zemindar* of Ramnad, for the time being, should pay to the plaintiffs (the appellants, Ranee Kunjara Natchear and her daughter) maintenance at the rate of Rs. 400 per mensem, with the arrears of such maintenance from the date of the institution of the suit.

Against the first of these decrees the Collector, and against the second, Ranee Kunjara and her daughter, appealed to the High Court of Madras; and on the 26th of March, 1863 that Court made an Order on both appeals, whereby it directed the Civil Judge to try the following issue:—"Was the adoption made with the authority of Mootoo Veroyee, widow of Annasamy, or with that of any others of the kindred of the late *zemindar*, Ramasamy, in whose behalf the said adoption was made?" It further gave certain directions as to the evidence to be produced on the trial of the issue.

This issue was accordingly tried on the 1st of September, 1863; and the findings of the Civil Judge were in effect, that the consent of Mootoo Veroyee, and of all the then surviving kindred of Ramasamy, had been obtained to the adoption. Against this finding the Collector, as well as Ranee Kunjara and her daughter, again appealed to the High Court, which Court, on the 17th of November, 1864, after two hearings, pronounced an elaborate judgment in favour of Ranee Parvata Natchear's right to adopt, and her exercise of it in the particular case and in doing so the Court came to the following conclusions:—

First, that the widow of the late *zemindar* had made a valid adoption; that there was no doubt that it was made with the assent of the majority of her husband's *sapindas*; and that though it might be doubtful, whether the Civil Judge was right, there were not sufficient grounds for saying that he was wrong, in thinking that all the *sapindas* then living had been proved to have assented.

Second, that, considering the extent of the property and

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the fact that she was the last surviving widow of the *zemindar* Annasamy, Ranee Kunjara was entitled to a more liberal maintenance than that awarded by the Civil Judge; and that such maintenance should be at the rate of Rs. 10,000 per annum. Subject to that modification, the decrees below were affirmed, and the appeals dismissed without costs.

From the decrees drawn up in conformity with this judgment, the following appeals have been presented, *viz* :—

First, an appeal by the Collector, impeaching the validity of the adoption, and also objecting to so much of the decree of the 18th of March, 1861, as declared, or implied, that Ranee Parvata Natchear had power to alienate or affect the *zemindary* beyond her life-interest.

Secondly, an appeal by Ranee Kunjara and her daughter, also impeaching the adoption; and further objecting to the decree of the 12th of April, 1861, in so far as it declared that Ranee Kunjara had no right of succession to the *zemindary*.

Thirdly, a cross-appeal by Ranee Parvata Natchear and Ramalinga, objecting to the maintenance awarded by the High Court as exorbitant; and insisting that the decree of the Civil Judge ought not to have been varied in that respect.

All these appeals have been heard together; and their Lordships have now to dispose of them.

The principal contest has been upon the broad and general question, whether by the Hindu Law as current in what is known as the Dràvida Country (wherein Ramnad is situate,) a widow can adopt a son to her husband without his express authority? And if so, by whose assent that defect of authority must be supplied?

Their Lordships think it will be convenient to consider in the first place how this question really stands upon the authority of Mr. Colebrooke and Sir Thomas Strange.

Mr. Colebrooke's note on the Mitacshara (Chap I, Sec. XI, Art. 9), which has been much discussed, clearly involves three propositions:—*First*, that the widow's power to receive a son in adoption, subject to some conditions, is now admitted by all the Schools of Hindu Law except that of Mithila. *Second*, that the Bengal (or Gaura) School insists that the widow must

have the formal permission of her husband in his lifetime. *Third*, that some at least of the other Schools admit the adoption to be valid, if made by the widow with the assent of her husband's kindred. The first two propositions are admitted; but it has been argued for the appellants, that on the true construction of this note, Mr. Colebrooke's authority for the last proposition is limited to the Mahratta School, in which the treatise called "The Muyookha" is the predominant authority. Balam-Bhatta, however, whom he cites as an authority for a power of adoption in the widow wider even than that expressed in the third proposition was a commentator of the Benares School. And the several notes of Mr. Colebrooke, at pp. 92, 96, and 115 of the second volume of Strange's "Hindu Law," seems to their Lordships to show, conclusively, that he considered the doctrine embodied in the third proposition to be common to the followers of the Mitacshara in the Benares as well as in the Mahratta School, and as such to be receiveable as the law current in the Zillah Vizagapatam, which lies within the northern, or Andra Division of the Dravida Country.

Again, Sir Thomas Strange's statement of the law in his work Vol. I p. 79, is clear and unambiguous. He says: "equally loose is the reason alleged against adoption by a widow, since the assent of the husband may be given, to take effect (like a will) after his death; and, according to the doctrine of the Benares and Maharashtra Schools, prevailing in the Peninsula, it may be supplied by that of his kindred, her natural guardians: but it is otherwise by the law that governs the Bengal Provinces."

Their Lordships entertain no doubt, that the term, "the Peninsula." as used here, and other passages by the same author, denotes that part of India which is south of the line drawn from Ganjam to the Gulf of Cambay, and includes the whole of Dravida District. The learned Counsel for the appellants, however, appeal from Sir Thomas Strange as a text-writer to Sir Thomas Strange as a Judge, and cite his *dictum* in *Veerapermall Pillay* v. *Narrain Pillay* (1) as opposed to this passage. In that case, Sir Thomas Strange, after citing the text of Vasishta, says: "Hence it may be inferred, what appears confirmed by

(1) 1 Strange's Mad. Cases, pp. 103 & 121.

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opinions of living Hindu lawyers, and by every case of the kind we are acquainted with, that the consent of the husband is indispensable to adoption into his family." But this passage does not alter the view which their Lordships have already expressed as to the effect of the matured authority of Sir Thomas Strange. The precise question which is now under consideration, was not in issue in that case, where there was a written authority from the husband, and where the real issue was, whether the widow could adopt a boy not designated in that written authority. Again, the case was decided in 1801, at a time when the ancient authorities of Hindu Law were far less accessible to a European Judge than they have since become. And Sir Thomas Strange, in his work composed twenty years later, says of this very case of *Veerapermall Pillay* v. *Narain Pillay* (1), that it was discussed on comparatively imperfect materials; that the public was not then possessed of the extensive information contained in Mr. Colebrooke's translation on the Law of Inheritance, and the treatise on adoption since translated by Mr. Sutherland, to say nothing of the MSS. materials that came subsequently to his own hands, and which had contributed largely to every chapter of his work. There can, therefore, be no doubt but that the passage in his book contains the matured opinion of Sir Thomas Strange, and that it must be treated as an authoritative declaration of that opinion controlling his *dictum* in *Veerapermall Pillay* v. *Narain Pillay* (1).

Having thus ascertained what was the opinion of two of the highest European authorities upon this question of the Hindu Law current in the South of India, their Lordships have next to consider, whether any sufficient reason has been assigned for treating that opinion as unfounded.

The remoter sources of the Hindu Law are common to all the different Schools. The process by which those Schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India; Schools with conflicting doctrines arose. Thus the Mitacshara which

(1) 1 Strange's Mad. Cas., 91.

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is universally accepted by all the Schools, except that of Bengal as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the Dáyabhága in those points where they differ, was a commentary on the Institutes of Yajnawalkya; and the Dáyabhága, which, wherever it differs from the Mitácshará, prevails in Bengal, and is the foundation of the principal divergences between that and the other schools, equally admits and relies on the authority of Yajnawalkya. In like manner there are glosses and commentaries upon the Mitácshará which are received by some of the Schools that acknowledge the supreme authority of that treatise, but are not received by all. This very point of the widow's right to adopt is an instance of the process in question. All the Schools accept as authoritative the text of Vasishta, which says, "Nor let a woman give or accept a son unless with the assent of her lord." But the Mithila School apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption, according to the Dattaca form, at all. The Bengal School interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the Muyookha and Koustubha treatises, which govern the Mahratta School, explain the text away by saying, that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus upon a careful review of all these writers, it appears, that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband.

The duty, therefore, of a European Judge who is under the obligation to administer Hindu Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of

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usage will outweigh the written text of the law. The respondent, Ramalinga, insists that, tried by either test, the proposition for which he contends, will be found to be correct.

The industry and research of the counsel in the Courts below have brought together a catena of texts, of which many have been taken from works little known, and of doubtful authority. Their Lordships concur with the Judges of the High Court in declining to allow any weight to these. But the highest European authorities, Mr. Colebrooke, Sir Thomas Strange, and Sir William Macnaghten, all concur in treating as works of unquestionable authority in the South of India the Mitácshará, the Smriti-Chandrika, and the Madhavyam, the two latter being as it were, the peculiar treatises of the Southern or Drávida School. Again, of the Dattaca-Mimansa of Nanda Pandita, and the Dattaca-Chandrika of Davanda Bhatta, two treatises on the particular subject of adoption, Sir William Macnaghten says that they are respected all over India; but that when they differ, the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the Provinces of Mithila and Benares. The Dattaka-Mimansa, by the author of the Madhavyam is also recognized as of high authority in the South of India by Mr. Ellis in his note at page 168 of the second volume of Strange's "Hindu Law."

Of these treatises, the Mitácshará is silent on the point in question. The Dattaka-Mimansa of Nanda Pandita (Sec. 1, Arts. 15 to Art. 18, and Arts. 27 and 28) is opposed to the respondent's view of it; but it seems equally opposed to an adoption by a widow, under any circumstances. The Dattaka-Chandrika (Sec. 1, Art. 31 and arts. 32) allows a widow to give a son in adoption where her husband has not forbidden her to do so, implying his assent from the absence of prohibition. The Smriti-Chandrika also permits a mother to give her son, if she be authorized to do so by an independent male. And it is argued, that what these last two authorities lay down concerning a widow's right to give, must, by parity of reasoning, be taken to be laid down concerning her right to receive a son in adoption. The Madhavyam (if that term is confined to the Parasara Madhavya, and does not embrace all the works of

Vidya Narainsamy) seems also to contain no direct determination of the point in question; but the Dattaka-Mimansa of that author clearly and explicitly declares the right of the widow to adopt with the authority of her father-in-law, and whatever other kinsmen of her husband may be comprehended under the *et cætera*. It cannot, therefore, be said, that the proposition laid down by Mr. Colebrooke and adopted by Sir Thomas Strange, is not supported by at least one of the original treatises of undoubted authority in Drávida. The Dattaca-Mimansa of Sri Rama Pandita, who is stated by the Judges of the High Court to be an authority very generally cited in the South of India, also confirms the proposition.

Their Lordships have excluded from their consideration of what is the positive law of the Dravida Country the peculiarity of the Mahratta Treatises (the Muyookha and Kaustubha), and also the Viromitrodaya, which is a treatise of especial authority at Benares. It must, however, be admitted that the fact of the reception of the doctrine in question by Schools so closely allied to that of Drávida is in favour of the hypothesis that it also obtains in the latter, and strengthens the authorities which directly support that hypothesis.

The evidence, that the doctrine for which the respondents contend has been sanctioned by usage in the South of India, consists partly of the opinions of *Pundits*, partly of decided cases. Their Lordships cannot but think that the former have been too summarily dealt with by the Judges of the High Court. These opinions, at one time enjoined to be followed, and long directed to be taken by the Courts, were official, and could not be shaken without weakening the foundation of much that is now received as the Hindu Law in various parts of British India. Upon such materials the earlier works of European writers on the Hindu Law, and the earlier decisions of our Courts, were mainly founded. The opinion of a *Pundit* which is found to be in conflict with the translated works of authority may reasonably be rejected; but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country. A considerable body of these *fatwas*, or opinions, is collected in the

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third part of what has been called throughout the argument in this case the "Green Books." It is not necessary to consider, whether they can all of them be supported to the full extent of what they affirm. But they show a considerable concurrence of opinion, to the effect that, where the authority of her husband is wanting, a widow may adopt a son with the assent of his kindred in the Dravida Country.

The decided cases, exclusive of those in the Bombay Presidency, which may be taken to be governed by the Muyookha, are certainly not many. But there is at least the case G. (*a*). decided by the late *Sudder* Court of Madras, and there are the French cases, which ought not, their Lordships think, to be wholly disregarded as recognitions of the law prevailing in the South of India. They are to be relied on in this case as affording evidence of a long continued series of opinions officially given, and judicially received, which were adopted as the ground of decision, showing a continued and recognized existence of a doctrine, which suffices to remove from the opinions of the *Pundits* in this case every suspicion of being opinions given to support the interests or judgments of others. Against these authorities the appellants have invoked that of the case of *Raja Haimun Chull Singh* v. *Koomer Gunshiam Singh* (1). But what was, in fact, decided by the very guarded judgment delivered by the late Lord Wensleydale in that case? It was that, according to the native text-writers—including probably Vasishta, certainly including the Dattaca-Mimansa of Nanda Pandita—the authority of the husband was requisite to a valid adoption; that the strictness of the law had been in many districts, and particularly in the Mahratta States, relaxed or modified by local usage, but that it had not been established to their Lordships' satisfaction that the relaxation had extended to the particular District of Etawah, in upper India. Disclaiming, therefore, the intention to decide what was the law in other parts of India, their Lordships held that they could not say that the law in that District did not require the direction of the husband in order to the valdity of an adoption, which it was necessary for them to do in order to reverse the

(*a*) *Appaniengar* v. *Alemaloo Ammal*, Mad. Sud. Dec., for 1858, pp. 5, 6.

(1) 2 Knapp's P. C. Cases, 293.

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judgment of the Court below. It is clear that that decision was not intended to govern, and cannot be taken to govern, a case arising in the South of India.

Upon the whole, then, their Lordships are of opinion that there is enough of positive authority to warrant the proposition that, according to the law prevalent in the Drávida country, and particularly in that part of it wherein the Ramnad *zemindary* is situate, a Hindu widow, not having her husband's permission, may, if duly authorized by his kindred, adopt a son to him. And they think that that positive authority affords a foundation for the doctrine safer than any built upon speculation touching the natural development of the Hindu Law, or upon analogies, real or supposed, between adoptions according to the *Dattaca* form, and the obsolete practice, with which that form of adoption co-existed, of raising up issue to the deceased husband by carnal intercourse with the widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient treatises above referred to, and in particular by the Datta-Mimansa of Vidya Narainsamy, the author of Madhavyam; but as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention.

It must, however, be admitted that the doctrine is stated in the old treatises, and even by Mr. Colebrooke, with a degree of vagueness that may occasion considerable difficulties and inconveniences in its practical application. The question, who are the kinsmen whose assent will supply the want of positive authority from the deceased husband, is the first to suggest itself. Where the husband's family is in the normal condition of a Hindu family—*i.e.*, undivided—that question is of comparatively easy solution. In such a case the widow, under the law of all the Schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no father the consent of all the brothers, who, in default of adoption,

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would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will. Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the husband, can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindus. Their Lordships do not think there is any ground for saying, that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think, that the consent of the father-in-law, to whom the law points as the natural guardian and "venerable protector" of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question, that the consents were purchased, and not *bonâ fide* attained. The rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption.

Again, it appears to their Lordships that, inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either

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has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family which afford no plea for a supercession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites.

Their Lordships, having thus stated the conclusions to which they have come upon the general question of law involved in these appeals, will now consider whether the High Court of Madras has correctly applied that law to the facts of the present case.

They are of opinion, that both the Courts below were right in holding that the collateral kinsmen of Ramasamy were to be found in the Taver family, of which the printed pedigree forms part of the record. According to Hindu Law, Ramasamy was the son, though by adoption, of Annasamy; and he again was the son, though by adoption, of the first Ramasamy, who was a Taver; and the heirs of Ramasamy, in the absence of decendants, were traceable upwards through these two persons, as if they had been his natural father and grand-father. There is no ground for saying that this, the legal consequence of the successive adoptions, was affected by the assumption of the name of the Sathupathy, the family name of the ancient *zemindars* of Ramnad and of Mangalswara, the grantee of the *zemindary*. It is to be observed, however, that this line affords none but very remote kinsmen, if their relationship to Ramasamy be calculated on the principle just stated. The nearest of them, Mootoosamy, would on that principle stand in a degree of relationship to Ramasamy which, according to the rule of the Mitácshará (Chap. 2, Sec. v., Art. 6), would exclude him from the category of *sapindas*, and place him in that of *samánodacas*, or those connected only by a libation of water and a common family name. He was, however, the natural brother of Annasamy, and that circumstance might strengthen his title to be considered, in the absence of nearer connections, the natural male protector of Ramasamy's widow. Again, the person who really filled the office of protector, and that by the express appointment of

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Ramasamy, was, up to the time of her quarrel with her daughter-in-law, Mootoo Veroyee. Nor is it by any means unusual in a Hindu family to find the mother-in-law occupying a position of considerable power and importance. Moreover, she was unquestionably the heir to the property next in succession to Ranee Parvata Natchear, after the failure of Ramasamy's descendants It, therefore, appears to their Lordships, that in this state of the family the assent of Mootoo Veroyee, of Mootoosamy, and of the other persons who are proved beyond all question to have assented, was sufficient to ligitimate the adoption, even if the evidence has failed to prove the consent of the yet remoter kinsman, Ramrajah Taver.

It has been argued, however, that even if this adoption would have been regular had Ramasamy died childless and intestate, his *arzi* relating to the management and descent of the *zemindary* contains an indication of his intention that his daughters and their descendants should be his successors and representatives, which ought to be taken to imply a virtual prohibition of the act of adoption by his widow. Their Lordships cannot accede to this argument. Ramasamy, no doubt, intended to be represented by his daughter's line, should that line continue. But he made no express provision for its failure, and the same reasons which justify a presumption of authority to adopt in the absence of express permission are powerful to exclude a presumptive prohibition to adopt, when on a new and unforeseen occasion the religious duty arises. His widow has not claimed a power to adopt, except on the happening of the contingency for which her husband omitted to provide. And her power so limited, not having been qualified by his disposition, must be determined by the general law.

Another argument for the appellants was founded on the attempted adoption of a son, Annasamy, by Dorarajah. That person is not a party to either of these suits; he has not impeached the adoption of the respondent, Ramalinga; he has, on the contrary, supported it as a witness. Nothing decided by the decrees under appeal can prejudice his rights, if he has any, under an adoption which the Revenue authorities at the date of it seem to have treated as illegal. Their Lordships have not before them the necessary materials for determining, whether

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that adoption was in fact valid or invalid; or whether, if valid, it would have any, and what effect on the title of the respondent, Ramalinga. In that state of things neither of the present appellants can be allowed to insist on this supposed *jus tertii* as an objection to the decrees which they impeach.

Their Lordships have, therefore, come to the conclusion, that these decrees and the judgment on which they proceed, are substantially right, in so far as they affirm, as between the parties to this litigation, the validity of the adoption by Ranee Parvata Natchear of the respondent, Ramalinga.

They also think that there is no foundation for the other and minor objection taken by the Collector to the decree of the 18th of March, 1861, on the ground that it asserts a power in Ranee Parvata Natchear to alienate or affect the *zemindari* beyond her life-interest. Her power of alienation is expressly stated to be "subject to the provisions of Hindu Law"; and the only object of that part of the decree was to affirm her right to exercise that power within the limits prescribed by the Hindu Law, free from the control of the Government or its Revenue Officers.

Their Lordships are further of opinion that there are no grounds for impeaching the decree of the 12th of April, 1861, in so far as it found that the appellant, Ranee Kunjara, stood in the relation only of step-mother to Ramasamy, and, therefore, could have no right to inherit his estate. They think, that this conclusion is supported by the will of Ranee Mootoo Veroyee, dated the 20th of January, 1820, which expressly states that Ramasamy was adopted by Annasamy and Ranee Mootoo Veroyee unanimously.

Upon the cross-appeal their Lordships have only to observe that the *quantum* of maintenance is a question with which the Courts of India, having local knowledge, and being conversant with the habits of native families, are peculiarly competent to deal with; and that strong grounds should be shown to justify any interference by this Committee with their discretion in that matter. And their Lordships see no reason for questioning the soundness of the discretion exercised by the High Court of Madras in the present case.

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Being, therefore, of opinion that the decrees under appeal are correct, and ought to be affirmed, their Lordships will humbly recommend to Her Majesty that the two appeals and the cross-appeal be each dismissed, with costs.

NOTE.—This case lays down that in the Drávida Country, in the Madras Presidency, the assent of the husband's kinsmen is a sufficient substitute for the authority of the husband to validate an adoption by the widow. What amounts to a sufficient assent must depend upon the circumstances of the family. Thus, where the widow is a member of an undivided family the requisite assent must be sought within that family, and authority of separate kinsmen will not be sufficient. (*Raghunadha* v. *Brojokishore*, L. R., 3 I. A., 154). Conscious exercise of discretion on the part of the kinsmen is necessary to constitute the requisite assent, so that assent obtained by a widow upon a false representation that she had received authority from her deceased husband is ineffectual to validate the adoption. (*Kavemabhdhi* v. *Ratnamanjar*. L. R. 7 I. A., 173)

The case is also important as explaining the growth of the different Schools of Hindu Law.

OMRIT KOOMAREE DABEE *

v.

LUCKHEE NARAIN CHUCKERBUTTY.*

[*Reported in 10 W. R. F. B., 76 ; 2 B. L. R. F. B., 28.*]

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September, 12.

The appeal was originally heard by Bayley and Phear JJ. who referred it to the Full Bench under the following remarks :—

BAYLEY, J :—In this case plaintiff Nundlal (now deceased, but represented in the appeal by his widow) sued for the property of one Rughoonath, his maternal uncle, on the allegation of a right of inheritance.

It appears that Rughoonath had a daughter, Koochilmonee, and that on her death one Suroop obtained Rughoonath's property. Nundlal sued Suroop for possession in Case No. 92 of 1861, got a decree and possession, but was dispossessed by one Luckhee Narain, a decree-holder, who sold the property in suit in execution as that of his judgment-debtor, Suroop.

Defendant, Suroop, denied that plaintiff ever was in possession, and stated that Luckhee Narain's decree against Suroop was collusive. Suroop also pleaded that plaintiff's ancestor having come from the Mithila country, plaintiff was incapable under Mitákshará law of inheriting, being a sister's son and so also could not sue.

The lower appellate Court has found that plaintiff's suit against Suroop, decided on an admission by Suroop of plaintiff's right of inheritance, was collusive and in fraud of Luckhee Narain and others of Suroop's creditors ; and further, that the plaintiff's possession was not proved. The lower appellate Court finally held that the plaintiff's family came from Mithila ; that they maintained the rights and ceremonies of the Mithila branch of the Hindu Law ; and that they were bound by the Mitákshará law ; that according to that law (citing page 28, Vol. I, Macnaghten) a sister's son is excluded from inheritance, and "therefore plaintiff, never having been in possession, and not being entitled to inherit, is not in a position to sue defendant and is not entitled to possession."

* *Present* :—The Hon'ble SIR BARNES PEACOCK, Kt., Chief Justice, and the Hon'ble L. S. JACKSON, J. B. PHEAR, A. G. MACPHERSON and DWARKANATH MITTER, Judges.

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The plaintiff's appeal was, therefore, dismissed by the lower appellate Court with costs.

On special appeal it is argued:—

1. That under the Mithila Law a sister's son can inherit.

2. That the Mitákshará law does not govern the case.

3. That plaintiff's possession does not affect the rights of the case.

4. That Koochilmonee only succeeded her uncle Gunganarain under a compromise, and that the rights of the reversioners were fully reserved thereby.

The 1st and 2nd grounds only are pressed on us, and, indeed, in my view of the case, the 3rd and 4th grounds do not arise, for I think that Mitákshará law does govern the case; and that even according to it the sister's son does inherit as a *bandhu*.

As to the question whether Mithila law governs the case, I would observe that it is quite clear from the evidence that the family is one of Kanouj Brahmins; and that there is nothing in that evidence to show that they emigrated from the Mithila country. That country is defined in the map annexed to Baboo Prosonno Coomar's translation of the Bibadh Chintamoni. It is, however, pleaded that the Judge has found that the plaintiff's ancestor did come from, and retain the religious rights and ceremonies of, Mithila. But the Judge finds this wholly without or rather against evidence; and in the face of plaintiffs' own pleading that they were governed by the laws of the Bengal School, and also in the face of the entire absence of evidence that the plaintiffs' ancestor came from Mithila, the statement of the Lower Appellate Court cannot, I think, under such circumstances, be accepted as a legal finding of fact.

Then it is pressed on us (and I will not say altogether wrongly) that, even if the family be not shewn to come from Mithila, still the Mithila law may be looked to with a view to illustrate Mitákshará law, as they approach very nearly, and indeed agree, on many points.

In this view, the Bibhadh Chintamoni, (p. 228, Ed. 1863), Baboo Prosonno Coomar's translation, is referred to as an

authority recognized and relied on for Mithila law. The passage is as follows:—

Vishnu says:—"The wealth of him, who leaves no issue, goes to his wife. On failure of her, to his daughter. If there be none, to the mother. If she be dead, to the father. In failure of him, to the brothers. After them, it descends to the brother's son. If none exist, it passes to the kinsmen *(bandhu)*. In their default, to relatives *(saculya)*. On failure of these, to the fellow-student. For want of these heirs, the property escheats to the king, excepting the wealth of a Brahmin."

Again a passage in page 299 of the some work is cited. It is as follows:—

"Therefore, the summary of the above-mentioned heirs is this—first, the son; on failure of him, the grandson; in his absence, the grandson's son; on failure of him, a chaste wife; in her default, the daughters; in their absence, the mother; in her default, the father; and in his default, the daughter's son; and in default of him, the brother; in his default, the brother's son; and on his death, the *nearest kinsmen*; in default of them, *the remotest kindred according to their order*; in default of all these, the *nearest saculya*; on failure of them, the *remotest saculya*; in their absence, maternal uncles *and others*; but, on failure of *all these* heirs, the king inherits, except the property of Brahmana, which goes to another Brahmana."

It is further argued that the Mitákshará law shows that a sister's son would inherit in this case, and Sec. 6, page 332, Colebrooke's translation of the Mitákshará, is first cited to us in support of this plea.

It is as follows:—"On failure of *gentiles*, the *cognates* are heirs. Cognates are of *three* kinds; related to the person himself,—to his father,—or to his mother,—as is declared by the following text: 'The sons of his own father's sister, and the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred.' The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred; the sons of his mother's paternal aunt, the sons of his mother's maternal aunt,

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and the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred.

Next, Chap. 2, Sec. 5, verses 3 and 6, are cited, *viz.*:—"On failure of the paternal grand-mother, the *Gotraja*, kinsmen sprung from the same family with the deceased, and *Sapinda* connected by funeral oblations, namely, the paternal grand-father, and the rest inherit the estate. For kinsmen, sprung from a different family, but connected by funeral oblations, are indicated by the term *cognate*. If there be none such, the succession devolves on kindred connected by libations of water, and they must be understood to reach to *seven* degrees *beyond* the kindred connected by funeral oblations of food, or else as far as the limits of knowledge *as to birth and name* extend. Accordingly Vrihat-Menu says :—'The relation of the *Spindas* or kindred connected by the funeral oblation ceases with the *seventh* person, and that of *samanodacas* or those connected by common libation of water, extends to the *fourteenth* degree or, as some affirm, it reaches as far as the *memory of birth and name extends*.' This is signified by '*gotra*,' or the relation of family name."

Then a passage of the Mitakshara not in Colebrooke's translation is cited. It is on a translation of the original accepted by both parties, as follows :—"When one having gone to a *foreign* country dies, let the descendants, cognates (*bandhus*) gentiles, or his companions, take the goods ; in their default the king. When of those who are associated in trade, any one having gone to a *foreign* country dies, then his share shall be taken by his heirs, *i. e.*, the son and other descendants, cognates, *bandhava*, *i. e.*, the *mother side* relatives, the maternal uncle, and others, the gentiles, *i. e.*, *sapindas*, besides the son and other descendants, and those who are come, *i. e.*, those associated in trade, from the foreign country. In their default, *i. e.*, in default of the descendants, &c., let the king take. By the word *ba* (or), the sage shows their rights severally. The rule as to the order contained (in the text)—the wife, daughters, &c.—is also to be understood for this place. The necessity for the text is to exclude the pupil, the fellow-student, the Brahmin, and to include the trader." (Mitakshara, p. 322, 3rd Ed., 1829).

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The next passage cited is from the Virmitrodaya, a work which Mr. Colebrooke states (and the Vakeel of the opposite party admits) is one recognized as of authority on Mitakshara law.

"In default of the *samanodacas*, *bandhus* (cognates) are heirs. Cognates are of *three* kinds related to the person himself, to his father, or to his mother. Accordingly the following text :—'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his maternal uncle, must be considered as his own *cognate* kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt and the sons of his father's maternal uncle, must be deemed his fathers' cognate kindered. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred. Here by reason of near affinity the cognate kindred of the deceased himself in the first instance, then the father's *cognate* kindred, and *next* his mother's cognate kindered, succeed.' This is the order of succession. In the text of Menu :—'Then the distant kinsman shall be the heir, or the spiritual preceptor or the pupil,' the term *sacul ya* comprehends the persons descended from the *same* family (*sogotra*), and the kinsman allied by common libation of water (*samanodaca*); the maternal uncles and the rest; and the *three* kinds of cognates. The term cognate (*bandhu*) in the text of Joggeeshwara or Jagnavalkya must comprehend also the maternal uncles, and the *rest : otherwise the maternal* uncles *and the rest* would be omitted, and their sons would be entitled to inherit, and not they themselves *though nearer in the degree of affinity,—a doctrine highly objectionable* (Virmitrodaya, p. 209).

Lastly, the special appellant cites the Nirnaya Sindhu in which is the passage :—"In default of the brother's son, the father, the mother, the daughter-in-law, *sister* and *her son*, are entitled to perform the Shrad, *because they are heirs.*"

It is also pleaded that by Mitakshara law, that which becomes women's property is not *peculium*, but does as *stridhun* (*peculium* does also) descend to the wife's own kindred. The passage in page 38, Vol. I of Macnaghten (given below) is cited to support this plea.

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"In the Mitakshara whatever a woman may have acquired whether by *inheritance*, purchase, partition, seizure, or finding is denominated *woman's property*, but it does not constitute her *peculium*. Authors differ in their enumeration of the various sorts of *stridhun*, some confining the number to eight, others to six, others to five, and others to three; but as the difference consists in a more or less comprehensive classification, it does not require any particular notice. The *most comprehensive* definition of a married woman's *peculium*, is given in the following text of Menu:—'What was given before the *nuptial fire*, what was given at the *bridal procession*' what was given in *token of love*, and what was received from a *mother*, a *brother*, or a *father* are considered as the *six-fold separate property* of a married woman.' And it may be here observed that *stridhun* which has once devolved according to the law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of inheritance;—for instance, property given to a woman on her marriage is *stridhun*, and passes *to her daughter*, at her death; but at the daughter's death, it passes to the heir of the daughter like other property, and the brother of her mother would be heir in preference to her own daughter, such daughter being a widow without issue."

On the other side, the ruling of Trevor and Campbell, Justices, is cited to us, [8 Sevestre, 491, *Gridharee Lall's case* (1)] in which it was held that the enumeration of *bandhus* is exhaustive, and not illustrative, and that none not enumerated can inherit. Under this ruling, a father's maternal uncle was excluded in that case and the plantiff's sister's son might be so in this case.

The respondent uses on his part most of the arguments on which the learned Judges, Trevor and Campbell, came to the decision, cited. It is also pressed on us on the same side by the respondent's pleader that the word "inheritance" in page 38 of Macnaghten refers to inheritance of *personal* property; that the context shows that *personal* property, only, and not in any way *real* property, was in the contemplation of the writer. It would be against all recognized and well-known principles of

(1) 4 W. R., *Civil Rulings*, 13, and 10 W. R. P. C., 31.

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Hindu Law to allow the husband's property to go to the wife's relatives instead of reverting to the husband's relatives, and that, if there be any doubt, the passage here cited from Manu fully clears that doubt, by expressly restricting the *six-fold* property of woman, and thus *excluding inheritance* of the husband's estate.

I am free to admit, that at one time, I felt that we ought to follow the ruling in *Gridharee Lall's case*, (1) but I think otherwise now.

Because, *firstly*, it is quite clear that the sister's son is enumerated in the Virmitrodaya and Nirnaya Shindhu.

Secondly.—Where sister's son is not enumerated, remoter kinsmen, such as maternal uncle and aunt's sons, are so. Why then should the nearer kinsmen of sister's sons be supposed to be excluded where more remote kindred are included ?

Thirdly.—It would hardly be compatible, with the known texts of the Hindu Law, for prescribing the provision of kinsmen to exclude a kinsman as a sister's son and to prefer a king, a Brahmin, a fellow student, to the sister's son; more especially, as the passages cited all look to *remote* kindred and others in preference to the king, Brahmin, fellow-student, &c.

Fourthly.—I think the passage of the Mitákshará *not* translated by Colebrooke, though referring to those who die in a foreign land, only recognizes kinsmen before the king, and only refers to the king of that foreign land, and perhaps as to the fellow-trader, but in all other respects *prefers all* kinsmen to others *not* kinsmen.

These considerations lead me to think, that it has been wrongly held in *Gridharee Lall's case*, (1) that the enumeration of the *bandhus is exhaustive*, not illustrative.

I would, therefore, not now, go into subsidiary points as to *stridhun*, but refer the case to the Full Bench to decide, whether under Mitákshará law, *a sister's son can inherit the real property of his maternal uncle.*

PHEAR, J.—The material facts of this case appear to me to be as follows :—

The land which forms the subject of the suit was formerly

(1) 4 W. R. Civil Ruling, pp. 13; 10 W. R. P. C., P. 31.

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the property of one Rughoonath, on whose death without leaving male issue, it came into the possession and enjoyment of his widow. When the widow died, Rughoonath's daughter, Koochilmonee, succeeded to the property, and at her death, it passed into the possession of *her* husband's nephew, named, Suroop.

While the property was thus in possession of Suroop, one Luckhee Narain, the holder of a bond from Koochilmonee brought a suit upon it against Suroop as Koochilmonee's representative. The plaint was filed on the 30th April, 1867, and Luckhee Narain obtained a decree on the 27th November of the same year. In execution of this decree, the property in question was sold. It was bought by Luckhee Narain himself; and in virtue of this purchase he has obtained possession of it.

The present suit was instituted on the 21st April, 1864, by one Nundlal, seeking to obtain possession of the property for himself on a title superior to that of Luckhee Narain, Suroop, and all others who claim through Koochilmonee. Nundlal, who has died since the filing of the plaint, was the son of Rughoonath's sister, and in that character he contended in this suit, that on the death of Koochilmonee he was the heir of Rughoonath, and entitled to take his immoveable property.

On this state of facts, as no effort was made by the defendants to justify as against the heir's recourse to Rughoonath's property for the satisfaction of Koochilmonee's bond, the first issue between the parties was, whether or not Nundlal as sister's son could by law inherit from Rughoonath.

The lower appellate Court finding as a fact that the plaintiff's family came from the Mithila provinces, and had always adhered to the religious rites and customs of those provinces, curiously enough held as a consequence that the plaintiff was bound by Mitákshará law. The lower appellate Court following the then construction of the Mitákshará law given by Macnaghten (Hindu Law, Vol. I, p. 28) determined that the plaintiff, as sister's son, was excluded from the inheritance, and accordingly, it dismissed his suit,

Against this decision, the plaintiff appeals, specially on grounds which are so worded as to appear very inconclusive as

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they stand; but, as argued before us by both sides, they seem to be substantially, *1st*, that the Court ought to have applied the Mithila Law to the case instead of the Mitákshará law, and that by the Mithila law, the plaintiff was entitled to succeed; *2nd*, that even by the Mitákshará law, if properly interpreted, the sister's son was not excluded from the inheritance.

As to the first objection, it seems to me that the lower appellate Court would have been wrong, notwithstanding its finding of fact, if it had applied the Mithila law, to the case. The preliminary question before that Court ought to have been not "what law governed the plaintiff," but "according to what law was inheritance to Rughoonath's property to be made out." Now Rughoonath as I understand was domiciled, and the property itself was situated, in a district where the Mitákshará prevails. Consequently, as nothing appears in the whole case to suggest that Rughoonath was subject to any other proprietary law, it follows that the Mitákshará law was the law according to which the matter of inheritance was to be determined.

As to the second ground of special appeal, the inclination of my own opinion, as at present advised, is that according to the Mitákshará text-books, the sister's son is heir in default of nearer of kin. The current of judicial decisions, however, runs so strongly against this construction, that I should not alone have considered myself justified at this date in resisting it. But as Mr. Justice Bayley desires to refer the case to a Full Bench, I am willing to concur in doing so, and think the question should be simply, whether under the Mitákshará law a sister's son can, in any case, be heir to his mother's brother as regards immoveable property?

The judgments of the Full Bench were delivered as follows:—

MITTER, J.—The question we have to determine in this case is whether, according to the Hindu Law current in the Benares School, a sister's son is entitled to inherit as a *bandhu* or *cognate*. Before proceeding, however, to determine the question, we must answer a preliminary objection that has been raised before us by the pleader for the respondent. It has been

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contended that the point under our consideration has been already set at rest by a decision of the Privy Council reported in page 681 of Sutherland's Privy Council Judgments. We are of opinion, that this contention cannot be maintained. True it is, that the decision of the late *Sudder* Court at Agra which was reversed by the Lords of the Judicial Committee, was based upon the ground that the sister's son is entitled to inherit as a *bandhu*, but this position appears to have been abandoned before their Lordships by the learned Counsel who conducted the case on his behalf. What were the reasons which induced the learned Counsel to adopt this course,—whether it was because he thought that under the circumstances of the case, his client could not succeed in the suit unless he was placed in a higher rank than that of a *bandhu*, or otherwise,—it is difficult for us to make out from the facts as reported. It is sufficient, however, for the purposes of the present argument to state that the result of this concession was, as their Lordships have themselves observed, to reduce the whole matter in controversy to the simple question as to whether upon the proper construction "of the Mitakshara, the sister's son is not entitled to come in among the earlier class of heirs or *sapindas*." This was in fact the only question that was discussed before their Lordships, and the only one upon which they have pronounced a judicial opinion. To remove all doubts on this point, the following passage in their Lordships' judgment might be conveniently referred to. "He there put the sister's sons out of the category in which Mr. Piffard would place them, though erroneusly *perhaps* he has put them in the category of *bandhu*." The word "*perhaps*" in the above sentence is sufficient to show that their Lordships did not intend to decide the point that we have now got before us, and the preliminary objection is accordingly over-ruled.

With reference to the main question itself, we are of opinion that the sister's son is entitled to rank as a *bandhu* according to the definition of that term as given in the Mitákshará itself. This definition is contained in the following passage:—

"On failure of the paternal grandmother, the (*gotraja*) kinsmen sprung from the same family with the deceased and

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allied by funeral oblations, namely, the paternal grandfather and the rest, inherit estate. *For kinsmen sprung from a different family, but allied by funeral oblations are indicated by the term cognate (bandhu)*"—(Colebrooke's Mitácshará, Verse, 3, Chapter 2, page 350.)

It will be observed that two conditions are necessary to meet the requirements of this definition, namely, *first*, that the claimant should be a kinsman sprung from a different family; and *second*, that he should be connected by funeral oblations. Both these conditions are strictly fulfilled in the case of the sister's son, and, as we will show further on, in a much higher degree in his case than in that of any of the nine individuals whose claims to succeed as *bandhus* are admitted on all sides. That he is a kinsman sprung from a different family is unquestionable, and it is equally clear that he is a *sapinda*, or one allied by funeral oblations, though some objections have been raised before us on this last point. It has been argued that according to Menu, a Hindu is required to perform the funeral obsequies of his paternal ancestors only; that in consequence of this rule, the *sagotras*, or those who belong to the same *gotra* or family, are the only persons entitled to be recognized as *sapindas*; and that the sister's son must be accordingly excluded from that category. We are of opinion that there is no authority whatever to support this contention; and we might even say that, whatever other objections might have been hitherto urged against the heritable right of the sister's son, this is the first time that his position as a *sapinda* has been questioned or disputed. Indeed, the very definition before us is a sufficient answer to this sophism; for if the *sagotras* alone are entitled to rank as *sapindas*, *bandhus* or kinsmen, sprung from a different family, but allied by funeral oblations must be non-existent. We have, however, the express authority of Menu himself to decide this point, and what is of still greater importance for the purposes of the present discussion, it is an authority quoted and acted upon by the author of the Mitacshárá.

"For with regard to the funeral obsequies of ancestors, daughter's sons are regarded as son's sons. Menu likewise declares:—'By that male child whom a daughter, whether

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appointed or not, shall produce by a husband of equal class. the maternal grandfather becomes the grandsire of son's sons.' Let that child give the oblation and take the inheritance."

It is manifest from the above that the maternal ancestors also are entitled to receive funeral oblations, and this proposition strikes at the very root of the contention that has been raised before us. Now, the sister's son is no other relative than the daughter's son of the father; and if it be once conceded, as it must be, that the daughter's son is a *sapinda*, it would follow as a matter of course that the sister's son is at least a *sapinda* of the father; and as such he would be clearly entitled at all events to rank as a *pitree-bandhu*, or father's cognate. In point of fact, however, he is also a *sapinda* of the deceased proprietor himself, not so near as the daughter's son, but nearer than every one of those individuals who are admittedly recognized as *bandhus*.

It is a well-known principle of Hindu Law recognized in all the Schools current in the country, that the relation of *sapinda* exists not only between the immediate giver and the immediate recipient of funeral oblations, but also between those who are bound to offer them to a common ancestor or ancestors. This principle is based upon the theory according to which a Hindu is supposed to participate after his death in the funeral oblations that are offered by any one of his surviving relatives to some common ancestor, to whom he himself was bound to offer them, when living; and hence it is, that the man who gives the oblations, the man who receives them, and the man who participates in them, are all recognized as *sapindas* of each other. Thus, for example, brothers are not required to perform the obsequies of each other, but they are nevertheless *sapindas*, being connected with each other through the medium of the oblations that they are respectively bound to offer to their common ancestors. The same rule holds good in the case of the brother's son, and in fact of every *sapinda* who does not stand in a direct line of ascent or descent with the deceased proprietor himself. To place this point, however, beyond all dispute, we wish to refer particularly to the nine admitted *bandhus* themselves. It will be seen that six out of these nine individuals are no other relatives than the daughter's

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son of the paternal grandfather, the daughter's son of the maternal grandfather, the daughter's son of the father's paternal grand father, the daughter's son of the father's maternal grandfather, the daughter's son of the mother's paternal grandfather, and the daughter's son of the mother's maternal grandmother. The remaining three are the son's son of the maternal grandfather, the son's son of the father's maternal grandmother, and the son's son of the mother's maternal grandfather. Not one of these individuals, not even the highest among them, or, in other words, the daughter's son of the paternal grandfather, is required to offer funeral cakes either to the deceased proprietor himself, or to his father, or to his mother, but at the same time they are admittedly entitled to rank as the *sapindas* of, man himself, or of his father, or of his mother, as the case might be. We can scarcely imagine upon what principle of Hindu Law it can be seriously contended that the daughter's son of the father is not a *sapinda* when the daughter's sons of the paternal and maternal grandfathers are acknowledged as such.

As regards the performance of funeral obsequies the daughter's son of the father occupies the same position as a son's son of the father, or, in other words, as a brother's son; whereas the daughter's son of the paternal grandfather, who is the highest in rank among the admitted *bandhus*, does not stand an inch higher, than the son of a paternal uncle. It is perfectly true that the lawyers of the Benares School sometimes use the word *sapinda* in the sense of consanguinity, or mere connection through the body; but in either case the position of the sister's son would remain unaffected. We have already pointed out that as regards funeral oblations, the sister's son occupies the same position as a brother's son; and as to consanguinity, the very nature of his relationship with the deceased proprietor obviously shows that he is nearer than the nearest of the admitted *bandhus*. If authority is needed on this last point, the following passage of the Mitácshará might be referred to as conclusive :—

"A *sapinda*,—she who has the same *pinda* or body is a *sapinda*; a *sapinda*, not a *sapinda* (take) her. The relation of *sapinda* arises from connection as parts of one body. So the

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relation of *ekpiṇda* in the son with regard to the father arises from the connection as parts of the body of the father. And with the grandfather, &c., in consequence of the connection with their body through the father. In the same manner in regard to the mother, from connection as part of the body of the mother. In the same manner in regard to the maternal grandfather, &c., through the mother. In the same manner with the mother's sister and maternal uncle, and the rest, by reason of the connection or parts of one body." Mitácshará Achar Adhay, leaf 6.

It is scarcely necessary to point out that in the passage before us the maternal uncle and the sister's son are distinctly recognized as *sapindas* of each other. The whole doctrine of *sapinda* according to the authorities of the Benares School, has been correctly expounded in the Vyabusta cited in the case reported in the third volume of the Select Reports, page 37. The *Pundits* were unanimously agreed in declaring that there are two significations only in which the word *sapinda* is used by the lawyers of that School namely, consanguinity and connection through funeral oblations; and the following passages from the Parasur Madhub and the Nirnoy Sindhoo, both of which works are recognized as authorities concurrently with the Mitácshará, were cited by them in support of this opinion.

"Those are *sapindas* who are connected by the tie of consanguinity; for instance, the father and the son are *sapindas* to each other and the body of the father is perpetuated in the son without any intervention. So also is the son by the medium of the father a *sapinda* of his paternal grandfather, and of his paternal great-grandfather. So also the son by the medium of his maternal grandfather is a *sapinda* of his maternal aunt and uncle, and by the medium of his paternal grandfather he becomes a *sapinda* of his paternal aunt and uncle, &c."—Parasur Madhub.

"Those are *sapindas* between whom exists a reciprocity of giving or receiving funeral oblations. The fourth person and the rest share the remains of the oblation wiped off with the *kusa* grass; the father and the rest share the funeral cakes. The seventh person is the giver of oblations. The relation of *sapinda* or men connected by the funeral cake extends,

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therefore, to the seventh person, or sixth degree of ascent or descent. It should not be supposed that an uncle and nephew are not reciprocally *sapindas*, as he who shares in the oblations offered by the uncle share also in those offered by the nephew. *In short, if any one of those who participate in the funeral oblation offered by one individual, be also the presenter of funeral oblations to one of his co-participators, then the whole number become sapindas of each other.*" (Nirnoy Sindhoo).

Is is perfectly clear that according to either of these authorities, the sister's son is entitled to rank as a *sapinda*. Before concluding this part of our judgment, we cannot pass over an important point connected with the Vyabusta we have already alluded to. The case in which it was given related to the daughter's son of the brother; and the *Pundits*, whilst admitting that he was entitled in every respect to rank as a *sapinda*, nevertheless stated, that he was not entitled to succeed as an heir. No text or authority of any kind was cited by them in support of this opinion, and the only reason put forward was that he is not a *sagotra*. This reason, we need hardly observe, is obviously unsound; for if the *sagotra sapindas* are the only persons entitled to inherit, the word *bandhu* which signifies *sapindas* of a different family, must be struck out from the law of inheritance. It has been said in a note attached to this case, that it is universally admitted that such description of persons (evidently meaning those who are *sapindas* but not *sagotras*) "are not sapindas for the purpose of inheritance." We are not aware of the authorities by whom this admission was made; and with all deference to the learned author of that note, we are bound to say that it is obviously incorrect. It may, however, be fairly asked that if the word *sapinda*, when used for "the purpose of inheritance," does not mean either consanguinity or connection through funeral oblations, in what other sense is it to be understood when it is used for that purpose, particularly with reference to such heirs as the daughter's son of the paternal grandfather, and the rest.

We have stated above that there are two significations only in which the word *sapinda* is used in the Benares School, and the pleader for the respondent has not even been able to suggest a third. We might also add that so far at least as the

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Nirnoy Sindhoo is concerned, the sister's son is expressly recognized as heir, as the following passage will show :—

"In default of the brother's son, the father, mother, the daughter-in-law, the sister, and her sons, are entitled to perform the Shrad, because they are the heirs." (Page 219).

We have shown by the foregoing remarks that the sister's son is entitled to rank as a *bandhu* according to the definition of that term as given in the Mitàcsharà.

We will now proceed to examine the various objections that have been urged, both before us and elsewhere, against his right to succeed as an heir. These objections may be all classified under the following heads :—

1st.—That the definition referred to has no connection with the law of inheritance.

2nd.—That the enumeration of *bandhu* made in verse 1, section 6, chapter 2, is exhaustive, and that the sister's son is neither included in that enumeration, nor mentioned as an heir in any other part of the work.

3rd.—That it has been settled by a uniform course of decisions that the sister's son is not entitled to inherit under the Hindu Law administered in the Benares School.

With reference to the first objection, we are of opinion that it is altogether untenable. The definition in question occurs in a part of the work which is exclusively devoted to the exposition of the law of inheritance ; and it may be fairly asked, if it has no connection with that law, for what other purpose has it been introduced in such a place ? A little reflection, however, will remove all doubts on this point. The Mitácsharà, it is well known, is a professed commentary on the Institutes of Yajnavalkya. The following text of that ancient sage contains the law of inheritance applicable to the estate of a deceased proprietor who has left no male issue.

"The wife and the daughter also, both parents and their sons, gentiles (gotraja), cognates (bundhoo), a pupil, and a fellow-student ; on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue." (Mitàcsharà, verse 2, section 1, chapter II, page 324).

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The whole of the second chapter from this point downwards as far as section 7 is nothing but a commentary upon the text cited above, and which for the sake of convenience we shall hereafter designate by the name of the general text. The definition in question occurs in verse 3, section 5, which has been already set out at length at the very commencement of this judgment, and the words are: *"for kinsmen sprung from a different family but connected by funeral oblations are indicated by the term (bandhu) cognate."* It is obvious that the word '*indicated*' here means 'indicated in the general text which contains the law of inheritance.' It would, therefore, be manifestly unreasonable to argue that the definition in question has nothing to do with that law. It might be as well said that the definition of *gotraja* given in the earlier part of the verse is also unconnected with it.

The second objection is also untenable. Verse 1, section 6, chapter II runs as follows:—"On failure of gentiles, the cognates are heirs. Cognates are of three kinds; related to the man himself, to his father, or to his mother, as is declared by the following text: "The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, *must be considered* as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed as his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncles, must be recognized as his mother's cognate kindred."

There is nothing whatever in this verse to justify the contention that the author of the Mitácshará intended thereby to lay down an exhaustive list of *bandhus* or cognates. He says *first* of all that *bandhus* are entitled to inherit in default *of gotrajas*, and, *secondly*, that *bandhus* are of three kinds, namely, those who are related to the man himself, and those related to his father and mother respectively. There can be no doubt whatever, that if he had finished the sentence at this point, no one could have seriously contended in the face of these two propositions, so manifestly general in their character, that he intended to exclude one single individual who is really

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entitled to claim the benefit of his own definition. The only argument, therefore, which can be advanced in support of this contention is the simple fact of his having concluded this sentence by quoting a text from one of the Hindu sages which contains the names of a limited number of *bandhus*. We are of opinion that this argument *per se* is entitled to no weight whatsoever. Isolated texts from various Hindu sages and of a similar description are to be frequently found in the Mitácshará, and it would be manifestly erroneous to contend upon the authority of any one of them that an exhaustive enumeration of heirs was intended to be made thereby. The following text of Vrihat-Menu quoted in page 326 of the Mitácshará, might be referred to as an illustration.

"The wealth of him who leaves no male issue goes to his wife. On failure of her, devolves on daughter; if there be none, it belongs to the father; if he be dead, it appertains to the mother." It would be obviously improper to say from the mere fact of the author of the Mitácshará having referred to this text, that he intended to declare that the particular persons mentioned therein are the only heirs to the estate of a deceased Hindu who has left no male issue; or that such even was the intention of Vrihut-Menu himself. As to the particular text before us, there is absolutely nothing in it from which it can be reasonably inferred that the author of it, at least, if not the author of the Mitácshará, had such an intention in view. All that it says is that certain relatives must be considered as *bandhus* of one class, and certain others as *bandhus* of two other classes respectively; it nowhere says that these persons are the only *bandhus* recognized by the Hindu Law. The object which the author of the Mitácshará had in view in referring to the text is evident. His own words are "as is declared by the following text"; and these words are sufficient to show that this text was referred to, merely for the purpose of establishing the three-fold classification of *bandhus* involved in the second of the two general propositions before adverted to. The necessity of this reference is also obvious. The first proposition required no special authority for its support, inasmuch as it was an obvious deduction from the order of succession laid down in the general text upon which he was commenting.

The second proposition, however, stood on a different footing,

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there being nothing in the Institutes of Yajnavalkya to sanction it directly; and hence it was that the author of the Mitácshará was obliged to rely upon the authority of another Hindu usage in order to support it. Why, then, are we to put a construction upon his words which is not only inconsistent with his own definition, but also with every general principle of law that has been inculcated by him throughout the treatise? It has been justly remarked by Sir William Jones, that the doctrine of funeral cakes is the key to the whole Hindu Law of inheritance. All the Schools of Hindu Law that are current in the country are agreed in accepting this principle as their guide, however much they might differ from one another with reference to particular points connected with its application. Those commentators who adopt the other doctrine of consanguinity, merely extend the limits of the *sapinda* relation by including a large number of persons *besides* those who are connected by funeral oblations. The author of the Mitácshará at all events is no exception to the general rule. The text of Menu which says "to the nearest sapinda the inheritance belongs," is frequently cited by him as a leading authority on all questions of Hind Law. Indeed the very definition of *bandhus* under our consideration is based upon this fundamental doctrine, and in the very next verse, he distinctly lays down that the order of succession to be observed among the different classes of *bandhus* is to be regulated by "nearness of affinity." We have already stated that our argument would not be affected in the slightest degree, whatever interpretation might be put upon the word "affinity". Are we then to suppose that the author of the Mitácshará has been so far forgetful of this fundamental principle, as to render himself guilty, unconsciously as it were, of the gross inconsistency of laying down a definition and of excluding those very persons who are best entitled to claim the benefit of it? In what way, we might repeat in this place, are the sister's son of the father and of the mother better qualified to inherit than the sister's son of the deceased proprietor himself? What doctrine of Hindu Law, directly or indirectly sanctioned by the author of the Mitàcshará, can be cited in support of the contention that the maternal grandfather himself is not an heir when his son's sons and his daughter's sons—nay, even when the son's sons and their

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daughter's sons of the father's and mother's maternal grandfather—are acknowledged as such? How, again, are we to reconcile the proposition that the maternal uncle, or, in other words, the uterine brother of the mother, is to be excluded from the line of inheritance, when her cousins, namely, the sons of her father's sisters and the sons of her mother's sisters, are to be included in it? Startling anomalies like these, to use an expression of the Lords of the Judicial Committee, cannot be imputed to an author without there being some tangible ground upon which such an imputation can rest. It is perfectly true that, in the particular case before us, we are bound to administer the Hindu Law as it has been expounded by the author of the Mitàcsharà; but we can hardly be justified in ascribing such gross absurdities to him at the very time when he was really trying to extend the category of *bandhus* by introducing the three-fold classification before alluded to.

The word *bandhu* has been sometimes interpreted as "distant kindred," but we can hardly suppose that the author of the Mitàcsharà seriously intended to authorize the succession of the most distant *bandhus* by sacrificing the right of those who are the nearest.

The following passages of the Mitàcsharà will remove all possible doubts on this point:—

(1) "'When one dies in a foreign country, let the descendants (*bandhus*), cognates, gentiles, or his companions take the goods, or, in their default, the king.' When he, who goes to a foreign country of those who are associated in trade dies, then his share should be inherited by his heirs, that is, the son and other descendants *(bandhus), cognates, i.e., the maternal side relatives, maternal uncle and others,* the gentiles, that is, the sapindas, besides the son and other descendants; and those who are come, that is, those among the associates who are come from a foreign country; or, in their default, that is, of the heirs, &c., the king shall take. The word *ba* shows that the heirs, &c., are entitled in alternation. *The rule as to this order is contained in the text: 'The wife, the daughter, &c.'* So it should be understood here. *The necessity for the text is to exclude the pupil, the fellow-student, and the Brahmin, and to include the trader*"—(Mitàcsharà).

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(2) The sage extends the rule to the spiritual guide, thus:—

"To the spiritual guide, the pupil, the learned Brahmin, *the maternal uncle*, and the learned in the Vedas also." The spiritual guide means he who teaches the Vedas; pupil means he who is taught the Vedas; learned Brahmin means he who recites the Vedangas. *"By taking the maternal uncle, the cognates of one's self, the cognates of the father, and the cognates of the mother who are, connected by origin are also employed. They are shown in the commentary on the text. The wife, the daughter &c."*

The first of these two verses relates to the law of succession applicable to the state of a foreign trader; and this law is contained in the text of Yajnavalkya which stands between inverted commas at the top of it, the rest being a mere commentary upon the text itself. It will be seen that the word *bandhava* is expressly stated to include the maternal uncle, whoever else might be entitled to come in within the word "others" which follows immediately afterwards. In the case of a foreign trader, therefore, it is perfectly clear that the maternal uncle is an heir; but before we can apply this argument to the general case, it is necessary to meet two objections that have been raised against such an application. The objections are, *first*, that the word used in this passage is *bandhava*, whereas the word used in the general text is *bandhu*; and *second*, that the passage in question refers to an "exceptional state of things," and cannot, therefore, be accepted as a guide for the general case.

Both these objections are conclusively met by the express words of the author himself. It is distinctly stated by him that the order of succession applicable to this case is exactly the same as that laid down in the general text, and further that the only necessity for making a separate text, for the exceptional case arose from that of excluding the fellow-pupil and the Brahmin, and of substituting the fellow-trader in their place. It is perfectly clear, therefore, that the words *bandhu* and *bandhava* are of identical import, or in other words, that the two texts are identical in every respect except as to the slight modification which relates to the fellow-pupil and the Brahmin.

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The second passage, too, is equally decisive on this point. It is distinctly pointed out therein that the word maternal uncle used in the text of Yajnavalkya stands for all the three classes of *bandhus* described by the author in his commentary upon the general text.

The Viramitrodaya, which is a work of high repute in the Benares School concurrently with the Mitácshará, is also clear on this point. "Cognates are of three kinds, related to the person himself, to his father, and to his mother, according to the following text: 'The sons of the father's sister, the sons of the mother's sister &c.' Here by reason of near affinity, the cognate kindred of the deceased himself in the first instance, then the father's cognate kindred, and next his mother's cognate kindred, succeed. This is the order of succession. In the text of Menu, 'then the distant kinsman shall be the heir or the spiritual preceptor or the pupil', the term *saculya* comprehends the persons descended from the same family (*sagotra*), and the kinsmen allied by common libations of water (*samanodaca*), *the maternal uncle, and the rest, and the* three *kinds of cognates. The term bandhu in the text of* Jagneswar (Yajnavalkya) must *comprehend also the maternal uncle and the rest,* otherwise maternal uncles and the rest would be entitled to succeed, and not they themselves, though nearer in affinity—a doctrine highly objectionable." (Viramitrodaya, page 209.)

The Vivada Chintamonee, which is a work of paramount authority in the sister School which goes by the name of the Mithilá School, is also of the same opinion, "the maternal uncle and the rest" being expressly recognized in the category of heirs laid down in page 299 of Baboo Prosunno Coomar Tagore's translation of the work.

In the face of all these concurrent authorities, it seems impossible to contend that an exhaustive enumeration of *bandhus* was made in verse 1, section 6, chapter 2 of the Mitácshará. It has been said that the sister's son is not entitled to inherit, because he has been nowhere mentioned as an heir especially by name; but this objection can be scarcely maintained if the doctrine of exhaustive enumeration falls to the ground. Apart from this last consideration, however, we do not see any reason why a specific enumeration by name should be insisted upon in

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every case. An enumeration by a general name, accompanied by a suitable definition sufficiently illustrated, is as good as any other kind of enumeration, particularly when the general name in question is applicable to a large number of persons whose individual names it would be very inconvenient to specify in detail; and we do not see any reason why in this particular case we should insist upon anything more than what we have already got before us. The great-grandson, for instance, is nowhere mentioned as an heir distinctly by name; and yet it would be simply absurd to contend that the estate of a deceased Hindu is to go to the fellow-pupil, or to the king even, if his own great-grandson is living. Similarly, when we come to the *gotrajas*, we find that no one below the descendants of the paternal great-grandfather is expressly recognized by name in any part of the Mitácshará, and yet it is a fact admitted on all sides, that the descendants of the remotest ancestors in the agnatic line, at least of those who stand within the fourteenth degree, are entitled to inherit in the Benares School. Why then are we to introduce this novel principle of interpretation when we come to deal with the *bandhus*? There might have been some foundation for such an argument, if the claimant had been a female relative, females as a class being generally supposed as having no right to inherit in consequence of their inability to perform religious rites; but in the case of male relatives, no restriction of any kind whatsoever can be cited to defeat their rights, if they are in a position to establish their *status* as *sapindas*. We have shown that "the maternal uncle and others" are entitled to inherit in addition to those who are admitted as *bandhus*; and those who would take in the maternal uncle only, are bound to show who were the persons included in the words "and others." As far as the purposes of the present case are concerned, it is almost self-evident that if the maternal uncle is entitled to succeed as a *bandhu*, the right of the sister's son would follow as a matter of course. We have seen that there is but one definition of the word *bandhu*, and the very nature of that definition conclusively proves that if the maternal uncle is a kinsman from a different family and allied by funeral oblations, the sister's son must necessarily be a kinsman of the same description.

It remains for us to meet the last objection. No doubt, if

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there were a uniform course of decisions establishing the doctrine that the sister's son is not entitled to succeed, we would have been scarcely justified in holding otherwise, however much we might have been disposed to do so for the reasons set forth above. The fact, however, is that there is no such uniform course of rulings as has been erroneously contended for before us. The following are all the cases that might be referred to on the point.

(1).—*Rajendro Namin* v. *Gocool Chand*, 1st Select Reports, page 43.

(2).—*Ilias Koonwaree* v. *Agund Roy*, 2nd Select Reports, page 37.

(3).—*Sheo Suhaye Singh* v. *Omed Koonwar*, 6th Select Reports, page 301.

(4).—Case No., XI. Macnaghten's Hindu Law, Volume II, page 91.

(5).—A decision of the Madras Sudder Court reported in page 247 of the Printed Cases for 1860.

(6).—Stoke's Reports, Volume I, page 1, page 85.

(7).—*Chootee Lall* v. *Gooroodyal*, Agra Select Reports, Volume V, page 198.

(8).—*Mohun Lall* v. *Thacooranee Sahaba*, Agra Law Journal, 1864, page 17.

(9).—*Johari Raoot* v. *Mussamut Kylaso*, Volume I, page 75, Weekly Reporter.

(10).—Sola Dey, 4 Legal Remembrancer, page 168.

(11).—*Gridharee Lall* v. *The Secretary of State*, 4 W. R., 13.

The *first* case has nothing to do with the particular point before us, and we would not have alluded to it at all if Sir Thomas Strange had not stated upon the authority of that case that the sister's son is not entitled to inherit in the Benares School. The contest in that case, however, was between the sister's son on the one side, and a *gotraja sapinda* on the other. The *Pundits* who were consulted in it very properly declared that if the Bengal Law were applicable to the case, the sister's son would be entitled to preference, but that the reverse

would be the case according to the Mithilá Law. The case was ultimately disposed of in favour of the sister's son, the Bengal Law being held to be applicable, but there is not a single word either in the decision itself or in the *Vyabusta* referred to, from which it can be gathered that the sister's son would not have succeeded as a *bandhu* if the Mithila Law had been adopted, if there were no *gotraja* relatives in his way.

The *second* case has been already referred to in an earlier part of this judgment. It related to the daughter's son of the brother, and, as we have already seen, the only ground that was put forward for excluding him from the inheritance was the erroneous one of his not being a *sagotra sapinda*.

The *third* case is directly in favour of our interpretation. The question was whether a daughter's son's son is entitled to inherit, and this question was determined in the affirmative upon the unanimous *Vyabusta* of the *Pundits* consulted on the occasion, including those of the Benares *Patshala*.

The *fourth* case clearly shows that the sister's son is entitled to succeed as a *bandhu*, both according to the Benares Law and according to the Mithilá. This case is of particular importance, inasmuch as it appears to have met with the approbation of Sir W. Macnaghten himself, who has evidently cited it as a leading authority on the point. We might also add that Sir W. Macnaghten had expressly stated in his note to case No. 5, reported in page 87 of the same Volume, that the *Vyabusta* given by the *Pundit* of *Zillah* Behar in which the sister's son is ranked as a *bandhu* is conformable to the law as current in Benares, Mithilá, and other provinces.

The *fifth* case is a mere *dictum*, but it is to be observed that the *Pundit* who was consulted on the occasion distinctly stated that the sister's son was entitled to inherit as a *bandhu*, and no authority of any kind was cited or referred to to contradict this opinion.

The *sixth* case is also a *dictum*, and the same remarks that have been made with reference to the preceding case apply to this case also.

The *seventh* case has nothing to do with the point before us. The dispute was between a brother's daughter's son and

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a *gotraja*, and it was very properly held that the latter is entitled to succeed in preference to the former.

The *eighth* case is a mere *dictum*, but in this instance the *dictum* is in favour of the sister's son.

The *ninth* case arose from a dispute between the sister's son and an agnatic relation, and it was correctly held in that case that the latter is entitled to succeed. The learned Judges, however, who decided the case, went on to say that the sister's son is not entitled to inherit either according to the Benares Law or according to the Mithilá Law. In the absence, however, of any further explanation on the point, we are rather disposed to think that all that was intended to be said is that he is not entitled to inherit in preference to the *gotraja*; but at any rate it is clear that this opinion cannot be treated as anything more than a mere *dictum*.

The next case, however, is directly to the point, and with all deference to the learned Judges who decided it, we are of opinion that it is based upon erroneous grounds. These grounds have been too fully examined by us in the preceding part of our judgment to require any further notice We wish, however, to make one remark in this place, and that is that the learned Judges appear to have been mainly influenced by the idea that the sister's son has never been recognized as an heir. With all deference to the learned Judges, we are bound to state that this was by no means the actual state of things at the time when their decision was pronounced, whatever it might be in this day. It is perfectly true that there is a paucity of decisions on the other side, but this fact appears to have mainly arisen from the peculiar doctrine of the Benares School by which the remotest relative in the agnatic line has been placed above the highest of the cognates. It might be added that very few cases, indeed, if any, can be pointed out in which the daughter's son of the paternal grandfather has been expressly recognized as an heir.

The *last* case relates to the maternal uncle of the father, and the grounds of the decision in this case being nearly the same as those in the one next above, no special remarks with reference to it are necessary.

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Upon the whole, then, it must be admitted that the majority of the earlier cases at least are in support of our view; and of the more recent, there are two cases at most that are directly opposed to it. The last objection, therefore, must also be over-ruled.

For the reasons set forth above, I am of opinion that the question put to us by the Division Bench must be answered in the affirmative, or, in other words, that the sister's son is entitled to inherit under the Hindu Law administered in the Benares School.

PEACOCK, C. J.—I am of opinion that in the absence of nearer relatives, a man may be heir to his mother's brother as regards property subject to the Mitákshará. The question has substantially been decided by the Privy Council (17th July, 1868, in the case of Gridharee Lall Roy against the Government of Bengal (1), in which it was held that the maternal uncle of the father of the deceased was not excluded from the class of *bandhus* capable of inheriting, and that the text contained in Article 1, Section 6, Chapter II, of the Mitákshará, does not purport to be an exhaustive enumeration of all *bandhus* who are capable of inheriting, and that it is not cited as such or for that purpose by the author of the Mitákshará.

The Judgment of Mr. Justice Dwarkanath Mitter, which he has just read, and in which he has displayed great learning, ability, and research, was written before the decision of the Privy Council of *Gridharee Lall* v. *The Government of Bengal* (1) was published here. My Hon'ble colleague has entered so fully into the reasons and exhausted the arguments in support of the view which he has taken, that it is unnecessary for me to do more than to say, that I concur in the reasons which he has given in support of the conclusion at which he has arrived; and it is extremely satisfactory to find that it is entirely in concurrence with the view taken in the judgment of the Privy Council.

The case must be sent back to the Judges who referred it.

JACKSON, J.—I am of the same opinion.

It is very satisfactory to feel that a conclusion so entirely

(1) 10 W. R., P. C., 31.

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consistent with reason is also in full conformity with the Hindu Law, as is conclusively shown in the exhaustive judgment which has been prepared by Mr. Justice Mitter, and also that the view which we had taken of the subject has been, it may be said, simultaneously adopted by the highest tribunal which deals with questions of Hindu Law.

PHEAR, J.—In referring this case to a Full Bench, I expressed the inclination of the opinion which I then held. Mr. Justice Mitter's very complete argument, in which I concur, has, I think, demonstrated that opinion to be correct. I would, therefore, answer the question in the words which have been used by the Chief Justice.

MACPHERSON, J.—I am of the same opinion.

NOTE :—This case lays down that the enumeration, in the Mitácshará, of certain relations as *bandhu* is not meant to be exhaustive, and whoever comes within the general description '*sapinda* sprung from a different *gotra*' is a *bandhu* and entitled to inherit as such. It will be observed that it is pointed out that the word '*sapinda*' is capable of bearing two senses, and it is not definitely decided which of the two senses should be accepted in this connection, a sister's son being a '*sapinda*' in either sense. It has, however, been held in the case of *Umaid Bahadur* v. *Udai Chand* (I. L. R., 6 Calc., 119) that here also the word '*sapinda*' has been used in the sense of 'connection by particles of one body' as explained in the Acharakanda of the Mitácshará, and not in the sense of 'connection by funeral oblations,' and that, therefore, a sister's daughter's son is a *bandhu* and inherits as such. Similarly, a father's maternal grandfather's great-grandson has been held to be a *bandhu* in *Ananda Bibi* v. *Nowbit Lal* (I. L. R. 9 Calc., 315). So, also, a paternal grandfather's sister's grandson (*Sethurama* v. *Pounnmal*, I. L. R., 12 Mad , 155) ; a paternal grandfather's daughter's daughter's son (*Venkataghiri* v. *Chandra* I. L. R., 23 Mad. 123), and a mother's maternal grand-father's son's daughter's son, (*Babu Lal* v. *Nanku Ram*, I. L. R., 22 Calc., 339).

MONIRAM KOLITA
v.
KERRY KOLITANY.*

[*Reported in L. R., 7 I. A., 115 ; I. L. R., 5 Calc., 776, P. C.*]

1880.
March, 13.

Their Lordships' judgment was delivered by—

SIR BARNES PEACOCK.—THIS is an appeal from a decision of a Full Bench of the High Court of Judicature at Calcutta. It was admitted by virtue of a special order of Her Majesty in Council, whereby the appellant had leave to appeal in the form of a special case upon the following questions, *viz.* :—

1st.—Whether, under the Hindu Law, as administered in the Bengal School, a widow who has once inherited the estate of a deceased husband, is liable to forfeit that estate by reason of unchastity ; and,

2nd.—Whether the forfeiture, if any, is barred by Act XXI of 1850.

The appeal was admitted on account of the importance of the questions submitted for determination, and the great interest which the Hindu community take in it.

The case came in the first instance upon special appeal before a Division Bench, consisting of Mr. Justice Bayley and Mr. Justice Dwarkanath Mitter, who were of opinion that the defendant had, by reason of unchastity, forfeited her right in her husband's property, but in consequence of a contrary ruling of the High Court, referred the two questions above mentioned to a Full Bench, with their remarks thereon.

The Full Bench consisted of the Chief Justice and nine other Judges, and the majority held that the widow, having once inherited the estate, did not forfeit it by reason of her subsequent unchastity. Three of the Judges, however, *viz.*, Mr. Justice Kemp, Mr. Justice Glover, and Mr. Justice Dwarkanath Mitter, dissented from the opinion expressed by the majority of the Court. The case is fully reported in the 13 Bengal Law Reports, p. 1. (1).

The subject has been very elaborately discussed by the Chief Justice and the other Judges of the Full Bench, and it has also

* *Present* :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) *Kery Kolitany* v. *Moniram Kolita*, 13 B. L. R. 1. F. B.

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been fully argued before their Lordships on behalf of the appellant. The respondent did not appear.

The opinion of Mr. Justice Dwarkanath Mitter, who was himself a learned and accomplished Hindu lawyer, and those of the other two Judges who were in the minority, are entitled to very great weight, but, having considered and weighed all their arguments, their Lordships are unable to concur in the opinions which they expressed.

The earliest case in which the subject was fully discussed in the High Court, is the case of *Srimati Matangini Debi* v. *Srimati Jaykali Debi* (1), which was the cause of the reference.

That case was originally tried before Mr. Justice Markby, who delivered a judgment in which he showed much research and great knowlege of the subject. The case was appealed to the High Court, and heard before the then Chief Justice and Mr. Justice Macpherson, who affirmed the judgment of Mr. Justice Markby.

Their Lordships will, in the first instance, advert to the judgments of the dissentient Judges, and in particular to the opinion expressed by Mr. Justice Mitter, on referring the case, and to his judgment after the argument in the Full Bench. Reasoning from the general notions of the Hindu commentators, touching the frailty and incapacity of women, and the necessity for their dependence upon, and control by, some male protector, and, from the origin and nature of a widow's interest in the property which she takes in succession to her husband, he arrived at the conclusion that she is, as he expresses it, "a trustee for the benefit of her husband's soul"; that inasmuch as, by reason of unchastity subsequent to her husband's death, she becomes incapable of performing effectually the religious services that are essential to his spiritual welfare, she ceases to be capable of performing her trust, and must, therefore, be taken to have broken the condition on which she holds the property, and to have incurred the forfeiture of her estate. It may be remarked that the other two dissentient Judges differed from Mr. Justice Mitter's view of

(1) 5 B. L. R., 466.

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the nature of a Hindu widow's estate, and therefore, from a good deal of the reasoning upon which his conclusion is founded. But, however, that may be, their Lordships entirely concur with the Chief Justice and the majority of the Judges in rejecting the somewhat fanciful analogy of trusteeship.

Mr. Justice Glover's judgment is founded upon the express texts, and upon the ground that by reason of unchastity, a widow becomes incapable of performing those religious ceremonies which are for the benefit of her husband's soul. He draws a distinction between a widow and a son, and says (1):—

"The theory of the Hindu Law of inheritance is the capability by the heir of performing certain religious ceremonies which do good to the soul of the departed, and he takes who can render most service. The sons down to the third generation could do most, offer most oblations, and confer the greatest benefits, therefore, they are first in the line of heirship. The *widow comes next, as being able to confer considerable, though less, benefits, and it is only because she is able to do this that she is allowed to take her husband's share.*

"It would seem, therefore, to be a condition precedent to her taking that estate, that she should be in a position to perform the ceremonies, and offer the continual funeral oblations, which are to benefit her deceased husband in the other world; and in this respect her position is very different from that of a son. The son confers benefits upon his father from the mere fact of being born capable of performing certain ceremonies. His birth delivers him from the hell called *put*; and, whether in after-life he offers the funeral oblations or not, *he succeeds to his father's inheritance from the fact of being able to offer them.* With the widow it is not so; she can only perform ceremonies and offer oblations so long as she continues chaste, and directly she becomes unchaste, from that moment her right to offer the funeral cake ceases."

These reasons do not appear to be sufficient to support the learned Judge's conclusion, that a widow forfeits her estate when she ceases to be able to perform the necessary religious ceremonies. It is admitted that she may by law hold the estate

(1) 13 B. L. R., 55.

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without performing them, and that she may give, sell, or transfer the estate to another for her own life. Nor does there appear to be any sufficient reason for the distinction attempted to be drawn between a son or other heirs and a widow with reference to the forfeiture of the estate when the person who has succeeded to it, has become incompetent to perform the duties which he or she ought to perform. The proprietary right of a son by inheritance from his father is expressly ordained, because the wealth devolving upon sons, benefits the deceased (Dàyabhàga Chap. XI, Sec. 1, v. 38), and the right of succession of other heirs to the property is also founded on competence for offering oblations at obsequies (18th verse), see also verse 32. But a son, even if by the mere fact of his birth he delivers his father from the hell called *put*, is, according to the Dayábhága, excluded for certain causes from inheritance in the same manner as other heirs (see the Dayábhàga, Chap. V, paras. 4, 5, and 6); but, if he once succeeds, the estate is not divested for anything less than degradation, through causes which would have excluded him if they had existed before succession arise after the estate has descended. This is admitted by Mr. Justice Mitter (1).

Their Lordships will proceed to consider the principal texts upon which the learned Judges who were in the minority founded their judgments.

Mr. Justice Mitter, in his judgment (2), says:—

"Of all the authorities above referred to, the Dayábhága of Jimutabahana, the acknowledged founder of the Bengal School, is undoubtedly the highest; and it is, therefore, to the Dayábhága that I shall first direct my attention. I do not wish, however, to go over all the texts quoted and relied upon by the author of that treatise in discussing the widow's right of succession. I will refer to two of those texts only,—namely, the text of Vrihut-Menu, cited in v. 7, Sec. 1, Chap. XI of Mr. Colebrooke's translation of the Dayábhága; and that of Càtyayana, cited in v. 56 of the same section and chapter. These two verses are as follow:—

'(1.) The widow of a childless man, keeping unsullied her

(1) 13 B. L. R., 7.
(2) 13 B. L. R., F. B., 40.

husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share.'

'(2.) Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it'."

With regard to the former of the texts above cited, although the present participle is used, it clearly refers only to the conduct of the widow up to the time of her husband's death, and not to her conduct subsequently. It cannot mean up to the time of her presenting the funeral oblation; for, notwithstanding the order of the words, the meaning of the text is, that having obtained the husband's share, the *patni* or widow should perform those ceremonies conducive to the spiritual benefit of her husband and herself, which can be accomplished by wealth, and which a female is competent to perform. See Viramitrodaya, Chap. III., part 1, s. 2, and the Smriti-Chandrika, Chap. XI, Sec 1, verses 13, 16 and 20. In this view the text would run thus,—"The widow of a childless man having kept unsullied her husband's bed, and persevered in religious observances, shall obtain his entire share, and present his funeral oblation."

Mr. Justice Glover points to the words "persevering in religious observances," to prove that the whole text applies to a period subsequent to the husband's death, and as referring to a continually abiding condition, because he assumes that a wife cannot perform religious observances during her husband's life, and that, therefore, those words must have relation to a period after her husband's death. But the assumption does not appear to be correct, for in the Smriti-Chandrika, Chap. XI., Sec 1, v. 17, the meaning of the words, "persevering in religious observances" are thus explained, "practising religious ceremonies even during the lifetime of the husband, with the husband's permission," &c., whence the inference is drawn, in verse 18, that a *patni*, to inherit her husband's estate, must be a pious woman. And again in verse 12, a virtuous woman is "one that lives with her husband, associating with him in the performance of rites ordained by Sruti and Smriti, and observing fastings and other religious ceremonies."

The second of the texts relied upon is that of Càtyayana.

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It is important to see for what purpose the text was cited, and with that view to refer to the verses immidiately preceding those in which the text is cited, for there is nothing more likely to mislead than to read a single paragraph from the Dàyabhàga or Mitàcsharà alone without studying the whole chapter, and in some cases, even, without studying several chapters of the same treatise.

In Chap. XI, Sec. 1, the author of the Dayábhága, verse 54, sums up his argument in support of the widow's right to succeed to the entire property of her husband, for which purpose he had cited the text of Vrihut-Menu. He says:—

"By the term 'his share' is understood the entire share appertaining to her husband, not a part only," (the translator adds the words "sufficient for her support)."

And then in v. 55 he concludes:—"Therefore the interpretation of the law is right as set forth by us," *viz.*, that "the widow's right must be affirmed to extend to the whole estate" of her husband (v. 6).

He then proceeds in v. 56 to deal with the mode of enjoyment, and to show that, notwithstanding a widow takes the entire estate, she is not entitled to make a gift, sale, or mortgage of it, to the exclusion of her husband's heirs. He says:—

"But the wife must only enjoy her husband's estate after his demise; she is not entitled to make a gift, mortgage, or sale of it."

And then, in support of that proposition, he refers to the second text cited, and proceeds:—

"Thus Càtyayana says:—'Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. *After her death* let the heirs take it'."

Mr. Justice Mitter, in his judgment, remarks at p. 41 of 13 B. L. R., that the author of the Dàyabhàga cited that text, not for the purpose for which he cited that of Vrihut-Menu, *viz.*, that of establishing a widow's right to succeed to the entire estate of her deceased husband, but for that of defining the nature and extent of the interest which devolves upon her, by virtue of that right.

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In his remarks, made on referring the case, however, he reasons upon it as an isolated text, and says (1) :—

"This passage shows clearly, not only that the widow's right is a mere right of enjoyment, the word 'enjoyment' being understood in the sense explained above, but that the exercise of that right is absolutely dependent on her 'preserving unsullied the bed of her lord'. *The participle form* of the word 'preserving,' *i.e.*, continually preserving, which is also the form used in the original (*pálayánti*) proves conclusively that the injunction is one in the nature of a permanently abiding condition, which the widow is bound at all times, and under all circumstances, to satisfy ; and the right of enjoyment conferred upon her being expressly declared *to be subject to such a condition*, every violation of it must necessarily involve a forfeiture of right."

Mr. Justice Glover also, at page 57, expresses a similar opinion, and he refers to the present participle "preserving" as denoting continuance, and as referring to the time after the widow has taken the property originally, and, he adds besides, if the words "keeping unsullied" refer only to past time, what is to be made of the other part, which he assumes to import a condition, *viz.*, "living with her venerable protector." "She cannot" he says, "live with him until she is a widow, and while she lives with him she is to keep unsullied her husband's bed." It is by treating the words, "living with her venerable protector" as constituting a condition that he endeavours to add force to his argument that the words "keeping unsullied the bed of her lord," also express a condition (2). But that argument fails inasmuch as it has been expressly held by the Privy Council, in the case of *Cossinauth Bysak* v. *Hurrosoondery Dossee* (3), that the words "abiding with her venerable protector" do not create a condition of forfeiture in case of her refusing to abide with him. Referring to that decision, Mr. Justice Mitter says that it lends in an indirect way considerable support to his view, inasmuch as that particular case

(1) 13 B. L. R., 16.

(2) 13 B. L. R., 57.

(3) Vyavastha Darpana by Shama Charan Sircar, p. 97, and (judgment of Supreme Court), 2 Morley's Digest, 198 ; s.c., Morton's Decisions, Ed. of 1841, p. 85.

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was decided expressly upon the ground that the widow had not changed her residence for unchaste purposes. Their Lordships, however, are of opinion that the words, "abiding with her venerable protector," do not, under any circumstances, create a condition or a limitation of a widow's right to enjoy the property of her husband to the period during which she abides with her protector. They agree with the Chief Justice in the opinion which he expressed at p. 82, that neither the words, "preserving unsullied the bed of her lord," nor the words, "and abiding with her venerable protector," import conditions involving a forfeiture of the widow's vested estate (1); but even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of Cátyayana's text taken by itself, as what are the conclusions which the author of the Dáyabhága has himself drawn from them. It is to that treatise that we must look for the authoritative exposition of the law which governs Lower Bengal, whilst on the other hand nothing is more certain than that, in dealing with the same ancient texts, the Hindu commentators have often drawn opposite conclusions. Now how has Jimutabahana dealt with this particular text? It has been seen for what purpose he cited it; but how does he comment on it in the rest of the section in which it occurs? He comments on the words, "venerable protector" (v. 57); he defines who are intended to take after the demise of the widow under the term "the heirs" (verses 58 and 59); glances at her duty to lead an abstinent, if not an ascetic, life, and to avoid "waste" (verses 60 and 61), and deals with her power of alienation, and the limitations upon it (verses 62, 63 and 64). But he nowhere says one word from which it can be inferred that, in his opinion, the text implied continued chastity as a condition for the duration of her estate, or that a breach of chastity subsequent to the death of her husband would operate as a forfeiture of her right. It can scarcely be supposed that a commentator so acute and careful as Jimutabahana, if he had drawn from the text of Cátyayana the inference that a widow was to forfeit the estate if she should become unchaste after her husband's death, would not have

(1) 13 B. L. R., 82.

stated that inference clearly by saying, in v. 57, "let her enjoy her husband's estate during her life, or so long as she continues chaste," instead of using only the words "during her life" and stating that "when she dies" the daugters and others are to succeed.

The right to receive maintenance is very different from a vested estate in property, and, therefore, what is said as to maintenance cannot be extended to the case of a widow's state by succession. However, the texts cited in regard to maintenance show that when it was intended to point out that a right was liable to resumption or forfeiture, clear and express words to that effect were used. Jimutabahana, in Chap. XI, Sec. 1, v. 48, of the Dáyabhága, refers to a text of Narada, in which he says,—"Let them allow a maintenance to his women for life, provided they keep unsullied the bed of their lord. But if they behave otherwise, the brother may resume that allowance." How different are those words from those used in the text of Cátyayana.

Mr. Justice Mitter, in order to get rid of the argument that a daughter becoming a sonless widow or unchaste after having succeeded to the state of her father does not forfeit the estate, argues that the texts to which he refers are applicable to a daughter as well as to a widow, and he refers to v. 31, Sec. 2, Chapter XI. of the Dáyabhága to show that the text of Cátyayana is applicable to all women (see 13 B. L. R., pp. 45 and 46,48 and 49).

It seems clear, however, that though an unchaste daughter is excluded from inheriting her father's estate, or an unchaste mother that of her son, it is not by virtue of either of the above-mentioned text of Vrihut-Menu or that of Cátyayana. Those texts have reference to the bed of the deceased owner of the estate. The words, "his funeral oblation," and "his share" and the "property," have reference to the oblation, the share, and the property of the lord or husband mentioned in the preceding parts of the texts, whose estate is to be inherited, and not to the husband or lord whose estate is not to be inherited, such as the husband or lord of a daughter or mother, as the case may be, of the deceased owner, who, in default of a widow, may be next in succession to inherit his estate.

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Verse 31, sec. 2, Chap. XI. only extends to other women the rule applicable to a wife, that a gift, sale or mortgage of the estate is not to be made, and that after her death the heirs of the deceased owner are to take, and not that part of the rule which is included in the words "keeping unsullied the bed of her lord." This is made clear by s. 30, in which it is said:—

"Since it has been shown by a text cited (Sec. 1, v. 56) that on the decease of the widow in whom the succession had vested, the legal heirs of the former owner who would regularly inherit his property if there were no widow in whom the succession vested, namely, the daughters and the rest, succeed to the wealth; therefore, the same rule (*concerning the succession of the former possessor's* next heirs) is inferred *á fortiori* in the case of the daughter and grandson (meaning a daughter's son). whose pretensions are inferior to the wife's."

Then comes s. 31, which is in the words following:—

"The word 'wife' in the text above quoted (sec. 1, v. 56) is employed with a general import, and it implies that 'the rule' (meaning the rule referred to in Chapter XI, Sec. II, and para. 30) must be understood as applicable generally to the case of a woman's sucession by inheritance."

Their Lordships have dwelt at some length upon the two texts that have been considered, since it is upon them that the arguments of the dissentient Judges are mainly founded. For the reasons above stated, they are of opinion that these texts, neither expressly nor by necessary implication, affirm the doctrine that the estate of a widow, once vested, is liable to forfeiture by reason of unchastity subsequent to the death of her husband.

The judgments of the High Court have so exhaustively reviewed the later authorities upon this question that their Lordships do not think it necessary to go through the same task. It is sufficient to say that, in their opinion, those authorities, though in some degree conflicting, greatly preponderate in favour of the conclusion of the majority of the Judges of the High Court.

In their Lordships' view it has not been established that

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the estate of widow forms an exception to what appears to be the general rules of Hindu Law, that an estate once vested by sucession or inheritance is not divested by any act which, before succession or incapacity, would have formed a ground for exclusion from inheritance (1).

The general rule is stated in the Viramitrodaya, a book of authority in Southern India (2) (see 12 Moo. I. A. 466; and Mr. Colebrooke's Preface to the Dáyabhága), and which may also, like the Mitácshará, be referred to in Bengal in cases where the Dáyabhága is silent. It is there said, in para. 3 of the chapter on Exclusion from Inheritance (Chap. VIII), "among them however, an outcast (*patita*) and addicted to vice (*upa pátaki*) are excluded if they do not perform penance," and then in para. 4 the exclusion again of these takes place if their disqualification occur previously to partition (or succession), but not if subsequently to partition (or succession), for there is no authority for the resumption of allotted shares. In para. 5 it is said that the masculine gender in the word "outcast," &c., is not intended to be expressive of restriction, and that the law of exclusion, based upon defects excludes the wife or the daughters, female heirs as well.

Mr. Justice Jackson has ably pointed out the great mischief, uncertainty, and cofusion that might follow upon the affirmance of the doctrine that a widow's estate is forfeited for unchastity, particularly in the present constitution of Hindu society and the relaxation of so many of the precepts relating to Hindu widows. The following consequences may also be pointed out.

According to the Hindu Law, a widow who succeeds to the estate of her husband in default of male issue, whether she

(1) This sentence which is above, in the printed copy of the judgment, should probably run thus: "is not divested by any act or incapacity, which, before succession, would have &c."—[I. L. R. 5, Calc. 788.]

(2) The following is in the judgment in *Girdhari Lall Roy* v. *The Bengal Government*, 12 Moo. I. A., 466; 1 B. L. R., P. C., 52:—"Adhering to the principles which this Board lately laid down in the case of *the Collector of Madura* v. *Mootoo Ramalinga Sathupathy*, 12 Moo. I. A., 397 and 438, their Lordships have no doubt that the Viramitrodaya which by Mr. Colebrooke and others is stated to be a treatise of high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the Mitácshará, and declaratory of the law of the Banares School."—[I. L. R., 5 Calc., 788].

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succeeds by inheritance or survivorship—as to which see the *Shivagunga case* (1)—does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant in tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband (2). The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate, the property descends to those who would have been the heirs of the husband, if he had lived up to and died at the moment of her death (3).

If the widow's estate ceases upon her committing an act of unchastity, the period of succession will be accelerated, and the title of the heirs of her husband must accrue at that period. Suppose a husband dies leaving no male issue and no daughter, mother, or father, but leaving a chaste wife, a brother, a nephew, the son of the surviving brother, and other nephews, sons of deceased brothers. The wife succeeds to the estate, and the surviving brother is her protector. (See Dáyabhága, Chap. XI, sec. 1., v. 57). If he survive the widow, he, according to the Bengal School, will take the whole estate, as sole heir to his deceased brother, and the nephews will take no interest therein, for brothers' sons are totally excluded by the exsistence of a brother (Dáyabhága, Chap. XI, sec. 1, v. 5. *id.*, Chap. XI, sec. 6, verses 1 and 2). The surviving brother may be advanced in years; the widow may be young. The probability may be that she will survive him. If her estate were to cease by reason of her unchastity, the benefit which he would derive from her fall would give him an interest in direct conflict with his moral duty of shielding her from temptation. But, further, the widow has a right to sell or mortgage her own interest in the estate, or in case of necessity to sell or mortgage the whole interest in it.

(1) 9 Moo. I. A., 604; 2 Pandit P. C. J., 25.
(2) 9 Moo. I. A., 604.
(3) 9 Moo. I. A., 601.

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(Dáyabhága, Chap. XI. sec 1, v. 62.) If her estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of his estate, if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her prior to the sale or mortgage.

Again, if the surviving brother should die in the life-time of the widow, all the nephews would succeed as heirs of their deceased uncle; but if the son of the surviving brother could prove that the widow's estate had ceased by reason of an act of unchastity committed in the life-time of his father, and that consequently the estate had descended to his father in his life-time, he would be entitled to the whole estate as heir to his father, to the exclusion of the other nephews. Thus the period of descent to the reversionary heirs of the husband might be accelerated by an act of unchastity committed by the widow; the course of descent might be changed by her act, and persons become entitled to inherit as heirs of the husband, who, if the widow had remained chaste, would never have succeeded to the estate; and others who would otherwise have succeeded would be deprived of the right to inherit.

In the case of *Srimati Matangini Debi* v. *Srimati Jaykali Debi* (1), the following remark was made by the then Chief Justice. He said:—

"In the case of *Katama Natchier* v. *the Raja of Shivagunga* (2), it was held that a decree in a suit brought by a Hindu widow binds the heirs who claim in succession to her; but that can only be in a suit brought by her so long as she holds a widow's estate. It would cause infinite confusion if a decree in a suit brought by a widow could be avoided, if it could be shewn that she had committed an act of unchastity before she commenced the suit. But if the rule contended for is correct, and the estate which a widow takes by inheritance is merely an estate so long as she continues chaste, all the acts which a Hindu widow could do in reference to the estate might be avoided by raking up some act of unchastity against her. Inconvenience would not be a ground for deciding a case like the present, if the law were clear upon the subject; but it is

(1) 5 B. L. R., 466, at p. 490.

(2) 9 Moo. I. A., 539; 2 Pandit. P. C. J., 25.

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an argument which may be fairly adduced when the authorities in favour of the opposite view are merely the expressions of opinion by Hindu Law Officers, or by European or modern text-writers, however eminent, or even decisions of a Court of Justice, when they are in conflict with the decisions of other Courts of equal weight."

Upon the whole, then, their Lordships, after careful consideration of this question, and of the authorities bearing upon it, have come to the conclusion that the decision of the majority of the Judges was the correct one, and it is important to remark that the High Court at Bombay, in the case of *Parvati* v. *Bhiku* (1), and the High Court in the North-Western Provinces, in the case of *Nehalo* v. *Kishen Lall* (2), have given judgments to the same effect as that of the Full Bench at Calcutta in the present case.

The widow has never been degraded or deprived of caste. If she had been, the case might have been different, subject to the question as to the construction of Act XXI of 1850; for upon degradation from caste, before that Act, a Hindu, whether male or female, was considered as dead by the Hindu Law, so much so that libations were directed to be offered to his manes as though he were naturally dead; see Strange's Hindu Law, pp. 160 and 261; Menu, Chap. XI. s. 183. His degradation caused an extinction of all his property, whether acquired by inheritance, succession, or in any other manner. (Dáyabhága, Chap. I., paras. 31, 32 and 33.) The opinion of Mr. Colebrooke in the *Trichinopoly case* is founded on the distinction between mere unchastity and degradation.

It is unnecessary to determine what would have been the effect of Act XXI of 1850, if she had been degraded or deprived of her caste in consequence of her unchastity.

Their Lordships, for the above reasons, will humbly advise Her Majesty to affirm the judgment of the High Court.

Appeal dismissed.

(1) 4 Bom. H. C. R., 25.
(2) I. L. R., 2 All., 150.

NOTE:—This case lays down that unchastity, subsequent to the husband's

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death, will not divest the estate already vested in the widow. It is, however, agreed that unchastity previous to the husband's death will exclude the widow from inheritance. The Calcutta High Court has held that chastity at the time when the succession opens out, is a condition of inheritance not only in the case of the widow, but also in the case of the daughter (*Ramananda* v. *Rai Kishori*, I. L. R., 22 Calc., 347), and of the mother *Ramanath* v. *Durga Sundari*, I.L.R., 4 Calc., 550). The Allahabad, Bombay and Madras High Courts have held otherwise, see, *Ganga* v. *Ghasita*, I. L. R., 1 All., 46; *Adyapa* v. *Rudrava*, I.L.R., 4 Bom., 104; and *Kojiyadu* v. *Lakshmi*, I.L.R., 5 Mad., 149.

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v.
SRI BALUSU RAMALAKSHMAMMA.*
and
RADHA MOHUN.
v.
HARDAI BIBI.†

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March, 11.

[*Reported in I.L.R., 22 Mad., 398; and I.L.R., 21 All., 460.*]

Their lordships judgment was delivered by—

LORD HOBHOUSE:—THE first of these two cases, which comes from Madras, was argued in February, 1898, but the judgment was postponed for the hearing of the second, which comes from Allahabad. The reason was that each case raises a question of general importance on which different views have been taken by different High Courts, and it was agreed on all hands to be advantageous that the two litigations should be under consideration at the same time. The Allahabad appeal was argued in the month of July last, and their Lordships are now prepared to state their opinions on both cases.

In the Madras case, the plaintiff sued as one in the line of succession to the last owner of an estate who had died without issue. The principal defendant was a boy who had been adopted by the last owner's widow with the consent of the family *gnâtis* or *sapindas*. The plaintiff claimed a declaration that the adoption was invalid. His main ground was that the adopted boy was the only son of his father. The defendants showed that the natural father of the boy authorized his widow to give him in adoption in the way which was actually effected between the two widows, and that the plaintiff himself in his character of *sapinda* was a party to the transaction. In addition to asserting the legal validity of the adoption, they pleaded that the plaintiff was estopped by his concurrence in it.

The District Judge gave no opinion on the point of estoppel. He found that the law in Madras was settled, and he gave judgment in the following terms:—

"The case illustrates how the people of this Presidency have

* *Present at the hearing of the appeal from Madras*:—Lords HOBHOUSE MACNAGHTEN, and Sir RICHARD COUCH.

† *Present at the hearing of the appeal from the North-Western Provinces*, decided in the same judgment with the above: Lords HERSCHELL, WATSON, HOBHOUSE and MACNAGHTEN, and Sir RICHARD COUCH.

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settled down under the law as enunciated by the Madras High Court so long ago as 1862 (1), and re-affirmed in 1887 (2), and it is impossible to say how many adoptions of only sons may have been made during the last thirty years on the faith of such enunciation of the law, and what innumerable rights might be disturbed by any contrary decision after such a lapse of time."

The case was heard on appeal before the late Judge, Sir T. Muttusami Ayyar and Mr. Justice Shephard, who affirmed the decree below. The learned Judges did not express any original opinion of their own on the main question. They thought that there was no estoppel, because at the date of the adoption, nobody thought of its being illegal. As to its legal validity, they found that all the Madras decisions had been in its favour and that the Madras Courts were right in following an uubroken current of authority in that Presidency, notwithstanding differences of view in other Courts.

At this Bar two points have been taken: *first*, that the gift or reception of an only son in adoption is invalid in law; and *secondly*, that, if not invalid, when the boy is received by the adoptive father or given by the natural father, it is so impoper that, in the absence of express authority given by a husband, his widow has no power to effect it.

In the Allahabad appeal, it is not necessary to make any statement of facts because the decree appealed from depends entirely on the answer given to a question referred by a Division Bench of the High Court to a Full Bench. That question is as follows:—

"The adoption of an only son having taken place in fact, is such adoption null and void under the Hindu Law?" That abstract question is the only one raised in the case lodged by the appellant and the only one argued at this Bar. The High Court answered it in the negative. Mr. Arathoon has contended in a learned argument that it ought to be answered in the affirmative.

As regards the second question raised in the Madras case, which is peculiar to that case, their Lordships feel no difficulty.

(1) *Chinna Gaundan* v. *Kumara Gaundan*, 1. M. H. C. R., 54.

(2) *Narayanasami* v. *Kuppusami*, I. L. R., 11 Mad., 43.

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The only authority for the argument of the appellants is the opinion of the late Sir Michael Westropp, delivered in the case of *Lakshmappa* v. *Ramava* (1), which was decided in the High Court of Bombay in the year 1875. That learned Judge held that, assuming that a man's only son may be given in adoption by himself, yet if he has not expressly given to his widow an authority to make such a gift, it cannot be implied by law. Now the authority of a widow to give or take in adoption differs in different Schools of Hindu Law. Their Lordships are not re-trying this Bombay decision. In Madras it is established, as the learned Judge, Muttusami Ayyar shows that, unless there is some express prohibition by the husband, the wife's power, at least with concurrence of *sapindas* in cases where that is required, is co-extensive with that of the husband. That is certainly the simplest rule, and it seems to their Lordships most consistent with principle. The distinction taken by Westropp, C.J., appears to have been quite novel, and also at variance with a decision by his predecessor, Sir Matthew Sausse. There may be some peculiarity in the School of Law which prevails in Bombay to support it, though it has not been brought to their Lordships' notice; but if there is any such, it does not apply to these parties in Madras. On this point, therefore, their Lordships agree with the learned Judges below.

What remains to them is the difficult task of deciding the more general question which is common to both the appeals. The difficulty which first meets the eye is the variety of judicial opinions and of opinions in treatises, which, during the last quarter of a century, have been gathering into definite opposite channels in the different areas of jurisdiction. There are also other difficulties beyond. Many of the judicial decisions relied upon are embodied in imperfect reports or in mere notes of points. The question is complicated by the use of different modes of adoption not always clearly specified, and by the intrusion of special, local or tribal customs. And the original authorities, on which all the conflicting opinions alike are based, are written in Sanskrit, which for many centuries has been a dead language known only to a few learned people, which hardly any of those who have been called to judgment have understood,

(1) (1875) 12 Bom. H. C. R., 364.

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the translations of which are more or less disputed, and of which it is averred, probably with truth, that its exact phases of meaning cannot be caught except by those who have studied closely and as a whole the language and the works of the particular writer under consideration. Their Lordships have, however, one advantage over their predecessors in these inquiries. The greater attention paid of late years to the study of Sanskrit, has brought with it more translations of the sacred Hindu books, and closer examinations of texts previously translated. And in the Allahabad case especially, the appellant's side was argued in the High Court by Mr. Banerjee, who is stated by the Court to be familiar with Sanskrit, and it is the subject of a very elaborate judgment by Mr. Justice Knox who is a student of Sanskrit and, as he tells us, has paid special attention to the books of Manu and Vasishtha. Perhaps the most convenient course will be to set out the more important texts which have been brought into discussion, then to see how they have been treated by recent commentators and by judicial decisions, stating finally the conclusions to which their Lordships have, with these aids, been brought.

The most revered of all the *Rishis* or sages is Manu, who, though he says nothing specific on the point now in issue, is referred to as favouring one side or the other. The passage cited are as follows. They are in Chapter IX.

"By the eldest son, as soon as born, a man becomes the father of male issue, and discharges his debt to his *pitris* or progenitors. That son alone, by whose birth he discharges his debt to his fore-fathers and through whom he attains immortality, was begotten from a sense of duty." He adds sentences to affirm the powers, privileges and duties of the first-born, and his great importance in the family.—Verses 106-109.

"By a son a man obtains victory over all people; by a son's son he attains immortality. Then by the son of that son he reaches the region of Brahma."—Verse 137.

"Since the son delivers the father from the region called *put*, he was therefore called *putra* by Brahma himself."—Verse 138.

"Whom the mother or the father give, with 'water,' a son,

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in distress, similar, endowed with affection, he is to be deemed a *dattrima*, one brought forth."—Verse 168.

In the three last quotations, their Lordships have followed the words of Mr. Justice Knox, who says that he has attempted to follow the text, word by word, without interpolating or taking away any particle, and that on that account his style is rough. (See Record and Golap Chandra Sarkar's "Treatise on Adoption," p. 282.)

Near to Manu, in point of antiquity and of authority, comes Vasishtha, around whose utterance on the point in issue, the greater part of subsequent comments has clustered. His writings have been translated by Dr. Bühler and published in the work entitled "Sacred Books of the East," Volume XIV., which has been edited by Professor Max Müller. The passage in that translation is as follows, Chapter XV., page 75 :—

"(1) Man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause."

"(2) (Therefore) the father and the mother have power to give, to sell, and to abandon their (son)."

"(3) But let him not give or receive (in adoption) an only son."

"(4) For he (must remain) to continue the line of ancestors."

"(5) Let a woman neither give nor receive a son except with her husband's permission."

On the record, Mr. Justice Knox gives his own translation which does not appear to differ substantially, though it does slightly in form, from that of Dr. Bühler.

Another ancient sage is Saunaka, of whom a text is quoted in the Dattaka-Mimansa of Nanda Pandita as follows :—

Section IV., Paragraph 1 :—"In reply to the question as to the qualification of the person to be affiliated, Saunaka declares :—'By no man having an only son (*eka putra*) is the gift of a son, to be ever made ; by a man having several sons (*bahu putra*), such a gift is to be made, on account of difficulty (*prayatnatas*).

Next in time is Yajnavalkya, whose writings, with com-

ments by Vijnaneswar, constitute the Mitacshara, a work of very high authority all over India. The material passages are as follows in Mr. Colebrooke's translation, Chapter I., Section XI :—

Para. 9. "So Manu declares :—'He is called a son given (*dattrima*) whom his father or mother affectionately gives as a son, being alike [by class] and in a time of distress, confirming the gift with water'."

Para. 10. "By specifying distress it is intimated that the son should not be given unless there be distress. This prohibition regards the giver [not the taker]."

Para. 11. "So an only son must not be given [nor accepted]. For Vasishtha ordains 'Let no man give or accept an only son."

Para. 12. "Nor, though a numerous progeny exist, should an eldest son be given, for he chiefly fufils the office of a son, as is shown by the following text :—'By the eldest son as soon as born a man becomes the father of male issue.'"

The above-mentioned writings are all classed among the Smritis, which are held by orthodox Hindus to have emanated from the Deity, and to have been recorded, not like the Sruti in the very words uttered by that Being, but still in the language of inspired men. They contain precepts whose authority is beyond dispute, but whose meaning is open to various interpretations and has been, and is, the subject of much dispute, which must be determined by ordinary process of reason. The Dattaka-Mimansa stands on a different footing. It is not older than the 17th century A. D., and does not claim any but human origin. Indeed its translator, Mr. Sutherland, says that it is "as its name denotes, an argumentative treatise, or disquisition, on the subject of adoption ; and though, from the author's extravagant affectation of logic, the work is always tedious, and his arguments often weak and superfluous, and though the style is frequently obscure, and not unrarely inaccurate, it is on the whole compiled with ability and minute attention to the subject, and seems not unworthy of the celebrity which it has attained" (1). Moreover it was written during Mahomedan rule and cannot be the work of a lawgiver or Judge. The date of the Dattaka-Chandrika is not certain, but it is at all

(1) Preface to the Dattak Mimansa, Madras Reprint, 1879.

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events very much later than the Smritis, and it stands only on the footing of a work by a learned man. Messrs. West and Bühler, in their valuable work on Hindu Law, 3rd Edition, page 11, speak thus:—"The Dattaka-Mimansa and the Dattaka-Chandrika,, the latter less than the former, are supplementary authorities on the law of adoption. Their opinions, however, are not considered of so great importance but that they may be set aside on general grounds, in case they are opposed to the doctrines of the Vyavahara Mayukha or of the Dharmasindhu and Nirnayasindhu." This is spoken with special reference to Bombay or Western India. But both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Mr. Justice Knox in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect, which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements. But so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge.

The passages in the Dattaka-Mimansa are as follows:—They are contained in Sec. IV. Para. 1 is that which gives the saying of Saunaka already quoted. Para 2.—"He, who has one son only, is *eka-putra*, or one having an only son: by such a one, the gift of that son must not be made; for a text of Vasishtha declares 'an only son let no man give &c." 'Para 6.—The writer comments on the word "ever" as used by Saunaka thus: "In a time of calamity, accordingly, Narada says:—'a deposit, a son, and a wife, the whole estate of a man who has issue living, the sages have declared unalienable, even by a man oppressed by grievous calamities: although the property be solely that of the man himself.' This text also regards an only son; for it is declaratory of the same import as the texts of Saunaka and Vasishtha." Para 8.—The write

comments on Saunaka's words "by no man having an only son" thus :—"From this prohibition the gift by one having two sons being inferrible, this part of the text ('By one having several sons, &c.') is subjoined, to prohibit the same by one having two sons also."

The Dattaka-Chandrika (Sec. 1, Para. 27) only repeats Vasishtha's saying, and couples it with the obligation to adopt a brother's son if there is one.

Their Lordships do not propose to spend much time in a close examination of the recent commentators. They have been very carefully sifted in the Indian Courts, and naturally so, seeing what was the paucity and obscurity of judicial authority until within the last thirty years or so. The principal effect which they have on the mind is to show the great variety and uncertainty of opinion on the question now in issue. The earliest of those referred to is Jagannatha, a learned Hindu lawyer employed by Sir W. Jones to compile a Digest. He thought that the prohibition in the Smritis is only moral and not legal. That also is the opinion of the two latest writers, both deeply versed in the Sanskrit language, Mr. Mandlik who appears to have translated the texts of Saunaka, and Mr. Golap Chandra Sarkar who has written a treatise on adoption. Sir Thomas Strange, writing in the year 1830, expresses an opinion in the body of his treatise, that the prohibition is monitory only, Vol. I, p. 87. On the other hand, the weighty opinions of Mr. Colebrooke, Sir Francis Macnaghten and Mr. Sutherland are thrown into the scale; and that of Mr. Justice Strange is also cited to the same effect, and is supposed by some to express the latest opinions of his father, Sir Thomas Strange. But it may be observed that Sir Francis Macnaghten and Mr. Justice Strange found their opinions on the wickedness of the act in question, and that the adoption of an eldest son is placed by Mr. Justice Strange on precisely the same footing as that of an only son, and is ranked by Sir F. Macnaghten as a heinous crime, though not so heinous as the adoption of an only son. Their Lordships think that the authority of recent text-writers must not be stated more favourably to the present appellants than is stated in the book of Messrs. West and Bühler. Expressing no opinion

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of their own, those learned writers say at page 908 :—"If he have but one son, the gift of that one is everywhere reprobated as a grave spiritual crime. By most the gift is thought invalid." Their Lordships turn now to the more solid ground of judicial decision.

In Madras, the course of decision has been very simple. In 1862 the High Court decided that the adoption of an only son, however sinful, was valid in law. It has been shown by Mr. Mayne that a previous decision then relied on was misapprehended by the learned Judges. But that was not the sole ground of their decision; they also relied on learned opinions and they agreed with those opinions. And the same High Court has since that time had the same question brought before it more than once; three times, it is stated in one of the judgments below. There has been no fluctuation in their decisions. It must be taken that the law in Madras has ever since been settled in favour of the present respondents.

In Allahabad also the condition of judicial decisions is simple. In 1879 the question was brought before a Full Bench of the High Court consisting of Sir Robert Stuart and Sir Charles Turner, who were English Barristers and three eminent Civilians, Justices Pearson, Spankie and Oldfield. The Court decided in favour of the adoption, Sir C. Turner dissenting. In the year 1889, some doubts were expressed on the point by Justices Straight and Mahmood, and that circumstance, coupled with the delivery of adverse opinions by the High Courts of Calcutta and Bombay, led to the rather unusual course of referring the same question to a Full Bench, of which Mr. Justice Mahmood was one. The result has been an unanimous decision supported by judgments of the Chief Justice and Mr. Justice Knox which are remarkable for research and fulness of treatment.

In Bengal there has been more fluctuation of opinion. The law was quite unsettled in the year 1868. It would be of little use now to examine the earlier decisions in the Sudder Dewany Adawlut and the Supreme Court. That has been done with great care by Sir William Markby in a case about to be mentioned. The first case which raised the exact question in the High Court, was heard in the year 1868 before Justices Dwarkanath Mitter and Louis Jackson. The judgment was

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delivered by Mr. Justice Mitter. After quoting passages from the two above-mentioned Dattaka treatises, the learned Judge lays the law down thus: "The institution of adoption, as it exists among the Hindus, is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion; and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and temporal aspects are wholly inseparable. 'By a man destitute of male issue only,' says Manu, 'must the substitute for a son of some one description always be anxiously adopted, for the sake of the funeral cake, water, and solemn rites.' (1) It is clear, therefore that the subject of adoption is inseparable from the Hindu religion itself, and all distinction between religious and legal injunctions must be necessarily inapplicable to it.—*Raja Upendra Lal Roy* v. *Srimati Rani Prasannamoyi* (2).

There is no doubt that this judgment has exercised very great influence on the controversy; and, indeed, if the learned Judge's fundamental position were sound, there could be no controversy at all. Let us assume for this purpose, though it is matter of grave dispute, that the learned Judge is right in saying that adoptions originated in motives of religion and not in the ordinary human desire for perpetuation of family properties and names. Still the question is whether certain precepts have a legal or only a religious bearing. What is there in the subject matter of adoption which makes it clear that all precepts relating to it must bear a legal character? The learned Judge does not discuss that question. He begs it, merely stating that his own inference clearly follows from Manu's text. Their Lordships think that the doctrine propounded by him is equally opposed to a reasonable construction of the books, apart from decision, and to decided cases. Indeed to show how far the doctrine is from being universally applicable, it would not be necessary to go further than the passage which the learned Judge himself cites from Manu, though, of course, differences may be suggested between prohibitory and mandatory injunctions. Manu prescribes adoption on the score of religion. According to Mr. Justice Mitter this is necessarily a legal injunction, yet nothing is clearer than that there is no legal

(1) Dattaka Chandrika, Sec. I., Cl. 3.

(2) (1868) 1 B. L. R., 221.

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compulsion upon a Hindu to adopt a son, however irreligious it may be in him not to do it. There is not even any legal compulsion on his widow to do it, when he is dead and cannot have a natural son. But the principle laid down is so important, goes so deep down to the root of these questions, and has exercised such influence, that their Lordships think it necessary to discuss it at length, for which this will be a convenient place.

Their Lordships had occasion in a late case to dwell upon the mixture of morality, religion and law in the Smritis, *Rao Balwant Sing* v. *Rani Kishori* (1). They had to decide whether a prohibition on alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing. They then said :—"All these old text-books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindu Law, Sir William Macnaghten says (2), 'it by no means follows that because an act has been prohibited, it should, therefore, be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible.'" They now add that the further study of the subject necessary for the decision of these appeals, has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity, never contemplated by the original law-givers.

The late extension of the study of Sanskrit has apparently resulted not in weakening but in strengthening the cited opinion of Sir William Macnaghten. Of course, their Lordships do not presume to form any opinion on questions of Sanskrit grammar, but they observe that Mr. Golap Chandra, who is frequently

(1) (1898) L. R., 25 I.A., 54, at p. 60.

(2) 'Principles and Precedents of Hindu Law', Vol., I, Preliminary Remarks, p. vi.

referred to in the judgments below, contends as a matter of Grammar, that words (*e. g.*, those of Saunaka) which have been translated in the imperative form of command should take that of recommendation. Mr. Mandlik insists on the same view, and Mr. Justice Knox says that he originally took a contrary view, but has been brought round by the authority of Mandlik and another Sanskrit scholar, Mr. Whitney.

Let us see now how Mr. Justice Mitter's principle accords with actual decisions. The controversy respecting eldest sons, whether or not they can be given in adoption, has a strong bearing on the present question. Manu attaches the highest importance to the character of an eldest son. The relevant passages from his Institutes have been quoted above.

No specific prohibition is contained in these passages, but the reasonable inference from them is given in the Mitàkshará in Ch. I, Sec. XI, para. 12, which has been already quoted. This express prohibition has been taken by some to be a legal rule, and has been enforced by modern writers of weight, as before stated, and in legal decisions. It would certainly fall within Mr. Justice Mitter's principle. But it is quite abandoned all over India as their Lordships understand; and the prohibition is held to be a matter for religious consideration only. It was the subject of careful examination and express decision by Justices Markby and Romesh Chandra Mitter in the case of *Junokee Debea* v. *Gopaul Acharjea* (1).

Again, it is laid down that the giver of a son ought to have more than two sons. The text of Saunaka quoted above says that the gift is to be made by one having several sons (*bahu putra*). The Dattaka-Mimansa, Sec. IV., cl. 8, lays it down that the Sanskrit word signifies more than two, and that Saunaka's precept was introduced for the express purpose of excluding the inference that a man with two sons might give one in adoption. The Dattaka-Chandrika, Sec. I, Cl. 29 and 30, declares the same law. The precepts are precise, and yet their Lordships cannot find that anybody asserts them to be law in any but the religious sense.

Another precept is that a Hindu, wishing to adopt a son,

(1) (1877) I. L. R., 2 Calc., 365.

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should adopt the son of his whole brother in preference to any other person. That question came before this Board in the year 1878 in a case in which the Subordinate Judge had held the adoption to be invalid for violation of this precept, and the High Court were of a contrary opinion. This Board held that the terms of the precept were contained in both the Dattaka Mimansa and the Dattaka-Chandrika, and they are founded on the Mitákshará. Nevertheless they held that it is not a precept of law. They referred to the opinions of English text-writers to support them. No decision in point was cited, and probably there is none in the books.

One of the conditions for adoption laid down by Manu in the passage first quoted from him is that there must be distress. This is emphasised in the Mitákshará, Chap. I, Sec. 11, para. 10: "The son shall not be given unless there be distress," which appears to mean that the giver must be in distress. "This prohibition", it continues, "regards the giver," and then occur the words "not the taker," apparently interpolated by the learned Benares lady who wrote under the name of Balam Bhatta. The Dattaka-Mimansa, Sec. IV, Cl. 20, says, "no distress existing, the giver commits a sin on account of the prohibition." If then the giver commits a sin, the taker who enables him to do it cannot be free from sin; and if the commission of a sin makes the transaction void in law, there can be no gift and consequently no adoption. And yet nobody contends for the legal force of this prohibition. It does not appear that in cases of adoption any inquiry is ever made about the distress of the natural father.

It is clear that the principle, laid down so confidently by Mr. Justice Mitter as paramount in cases of adoption, is repeatedly repudiated in practice; and in the Bengal case next to be cited, the learned Judges, while following the conclusion of their predecessors, dissociated themselves from the fundamental reason assigned for it.

Moreover this sweeping doctrine of Mr. Justice Mitter is not consistent with the prevalence of exceptional customs or other interferences with law. The extent to which the Smritis admit of special customs has not been argued in these cases and their Lordships cannot easily form any judicial opinion

about it. But in a discussion about the sources of Hindu Law by Dr. Jolly published in 1883 (see page 33), that learned Sanskrit scholar states grounds for holding that customs are only recognized by the Smritis when they do not contravene Divine laws.

Mr. Arathoon has impressed upon their Lordships more than once during this argument that the texts he relies on are held to emanate from the Divine Power. If then that Power has said that certain modes of adoption shall be null and void, how can any human practices lawfully limit its operation? And yet the validity of local or tribal customs to adopt only sons is asserted by every jurist. In the Punjab such a custom is received as the general law of that large area, and it governs the relations of the eight millions or so of the Hindus (Jats, Brahmans, Rajputs and others) who live there: and that, though the sources of their law are the same Smritis which are followed in other parts of India. The inference is that among numerous Hindu communities, the prohibition of the Smritis on this point has not been received as invalidating the transaction.

Again, if the religious and legal injunctions were co-extensive, it would place both Courts of justice and legislatures in a very delicate position when dealing with such matters. Suppose that in this Madras case, the Court had upheld the plea of estoppel; it would have set up a judicial rule to bar the working of a Divine law. Suppose that the statutory six years had elapsed and that the suit had been barred by time; then the Legislature would be interfering to bar the working of a Divine law. In each case a separation would have been made between those religious and temporal aspects which Mitter, J., declares to be wholly inseparable. Yet the British rulers of India have in few things been more careful than in avoiding interference with the religious tenets of the Indian peoples. They provide for the peace and stability of families by imposing limits on attempts to disturb the possession of property and the personal legal *status* of individuals. With the religious side of such matters they do not pretend to interfere. But the position is altered if the validity of temporal arrangements on which temporal Courts are asked to decide is to be made subordinate to inquiries into religious beliefs.

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No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation. A man may, in his conduct or in the disposition of his property disregard the plainest dictates of duty. He may prefer an unworthy stranger to those who have the strongest natural claims upon him. He may be ungrateful, selfish, cruel, treacherous to those who have confided in him and whose affections for him have ruined them. And yet he may be within his legal rights. The Hindu sages, doubtless, saw this distinction as clearly as we do, and the precepts they have given for the guidance of life must be construed with reference to it. If a transaction is declared to be null and void in law, whether on a religious ground or another, it is so; and if its nullity is a necessary implication from a condemnation of it, the law must be so declared. But the mere fact that a transaction is condemned in books like the Smritis does not necessarily prove it to be void. It raises the question what kind of condemnation is meant.

It is true that the learned Judges, Mitter and Jackson, refer to the texts of the Dattaka-Mimansa and Chandrika. But according to the paramount principle laid down by them, those texts could only be read in one way. That principle is in fact the sole ground of the decision, and as it cannot be admitted, the decision is deprived of weight.

The next case in Bengal was decided in the year 1878 by Chief Justice Garth and Mr. Justice Markby, *Manick Chunder Dutt* v. *Bhuggobutty Dossee* (1). In delivering judgment, Sir W. Markby reviews with great care and discrimination the then existing authorities, judicial and non-judicial, and he shows that only in four cases had the point been brought before the highest Courts of appeal in India. There had been no decision at that time in Allahabad. The Madras High Court supported the adoption: so apparently did the Bombay High Court, for the judgment of Chief Justice Westropp, which threw doubt upon the point, though delivered in 1875, was not reported as early as 1878. The learned Judge states the ground of his decision thus: "It appears to me, therefore, that the vast preponderance of authority, if not the entire authority in Bengal,

(1) (1878) I. L. R., 3 Calc., 443, at pp. 460, 461.

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is against the validity of the adoption of an only son; and if we were to hold the adoption of the plaintiff in this case to be valid, it would be necessary to over-rule both the carefully considered decision of Jackson and Dwarkanath Mitter, JJ., and the equally careful decision of four Judges of the Sudder Court. This of course could only be done by a Full Bench. But we could only refer the case to a Full Bench if there is a conflict of authority, or if we ourselves differ from these decisions. Having gone through all the cases with a great care, I do not think it can be said that there is any such conflict of authority in Bengal as to justify us in referring the case to a Full Bench on that ground; and I am not prepared to refer the case to a Full Bench upon the ground, that I myself think the adoption of an only son valid. On the contrary, on the best consideration, I have been able to give to the authorities, I think such an adoption ought, in Bengal, to be held to be invalid, wherever the effect of holding such adoption to be valid would be to extinguish the lineage of the natural father, and so to deprive the ancestors of the adopted son of the means of salvation."

This is very a instructive judgment and entitled on all grounds to great respect; and it is with great respect that their Lordships, being obliged to differ either from it or from other High Courts, proceed to note some points which detract from its weight. As to the vast preponderance of authority in Bengal, there were only two decided cases. One was before the Sudder Dewany Adawlut and is *Nundram* v. *Kashee Pande* (1). The report does not show any examination of the question by the learned Judges themselves. Their decision appears to rest wholly upon the opinion of *Pandits*, who in their turn content themselves with a simple citation of texts. The other decision rests entirely on a principle which is untenable, as Sir W. Markby himself showed the year before, in *Janokee Debia* v. *Gopaul Acharjea* (2). Moreover the Court in 1878 hardly addressed itself to the question why the injunctions relating to the only son are imperative and legal while those which relate to the eldest son are only monitory or religious. In 1877, Sir W. Markby says that while the latter prohibition is only

(1) (1823) 3 S. D. A., 232. (2) (1877) I. L. R., 2 Calc., 365.

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monitory, the former is clear, referring, as their Lordships suppose, to the differences of expression in Colebrooke's translation of the Mitákshará. In 1878, he intimates that the stronger objection to the adoption of an only son is based on religious grounds, on which their Lordships remark that Manu ascribes a character to the eldest son which affords strong religious grounds against his adoption, and that they do not find themselves competent to put such grounds in the balance against one another, so as to decide which is the stronger.

On this point they add, that there seems to have been a great deal of exaggeration used in urging the religious topic throughout this controversy, especially in later times. Manu says that by the eldest son, as soon as born, a man discharges his debt to his progenitors; and it is through that son that he attains immortality. According to him, the son serves his father's spiritual welfare at the moment of his birth. There is no intimation that if the boy dies the next day, or fails to have a son, this service is obliterated. Why then should it be so, if the boy is adopted? It is true that Manu attributes additional value to the first-born's son and grandson. It may be that such further benefit is lost by adoption, as it would be by death, but that is a very different thing from depriving the ancestors of the adopted son of the means of salvation, which have been already attained. Vasishtha, whose text is the fundamental one, does not rest his injunction on spiritual benefit at all but he says that the only son is to continue the line of his ancestors; one of the very commonest of human motives for desiring legitimate issue. Nor does he make any allusion to '*put*' here, or, if Mr. Justice Knox is right, elsewhere. If he was really thinking of the spiritual benefits of the son's ancestors as the ruling consideration, it is inexplicable that he should not have said so. Moreover, their Lordships asked during the argument why a man who had given a natural son in adoption could not afterwards, if he was so minded, adopt another; and neither authority nor reason was adduced to show that he could not.

That is the state of authorities in Bengal. The question has never come before a Full Bench, and it seems to their Lordships that there is only one decision, *viz.*, that of 1878, to which great weight is to be attached.

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In Bombay, after a Division Bench had decided in favour of validity, the question was discussed before another Division Bench in the year 1875, *Lakshmappa* v. *Ramava* (1). The case was decided on another ground as has been mentioned above. But the Chief Justice, Sir M. Westropp, delivered an elaborate judgment containing his reasons for holding the adoption of an only son to be invalid. Those reasons appear to have been adopted by the Court including Sir M. Westropp himself in a subsequent case which was decided in 1879 but has never been reported. In 1889, the question was referred to a Full Bench, who simply followed the unreported case. See *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (2). Sir C. Sarjent, the then Chief Justice, delivered judgment. He pointed out that prior to *Lakshappa* v. *Ramava* (1), the decisions in Bombay were in favour of validity; that the judgment of Sir M. Westropp in that case was the first that treated the point with due consideration; and that as the opinion there expressed had been adopted by a Full Bench, it was not proper to review it. The decision was necessarily in favour of invalidity. The law in Bombay therefore rests on the authority of the unreported case of 1879, which itself rests on the reasoning contained in the judgment of 1875.

In that judgment the learned Chief Justice makes more elaborate reference to the Smritis than is contained in any judgment earlier than the present Allahabad case. He dwells emphatically on Colebrooke's translation of the Mitákshará, showing that with regard to the only son the expression "must not," and with regard to the eldest, the expression, "should not," is employed. He adds that the distinction is even more strongly marked in the Mayukha, which is received as a high authority in Bombay. On this point, their Lordsbips interpolate again the remark that they are not re-trying the Bombay decision and that the effect of the Mayukha has not been argued before them. He then examines decisions by Bombay Courts prior to the establishment of the High Court, which certainly exhibit a confusion of legal opinion. The authority of the High Court up to 1875, though not perhaps very decisive, was in favour of validity. From this, and from the decision of the Madras

(1) (1875) 12 Bom. H. C. R., 364.
(2) (1889) I. L. R., 14 Bom., 249.

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Court, the learned Chief Justice differs. He cites the passages of Smritis and law books and English text-writers with which we have now been made familiar. And his decision apparently is founded on the language of Colebrooke's Mitákshará and on the judgment of Mr. Justice Mitter. Their Lordships have already stated their reasons for thinking that the latter of these foundations is unsound. The value of the former will be examined presently. They have also stated above that the point actually decided in this case is a novel suggestion of the learned Chief Justice, and is unsustainable in principle, and unsupported by authority unless there be something peculiar to Bombay to support it.

Before leaving this judgment, their Lordships ought to state their concurrence with the learned Chief Justice in his remarks on the so-called doctrine of *factum valet*. That unhappily expressed maxim clearly causes trouble in Indian Courts. Sir M. Westropp is quite right in pointing out that if the *factum*, the external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things, which ought not to be done in point of morals or religion, are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law. Sir M. Westropp has, not without cause, reduced the ambiguous maxim to its proper meaning.

Such was the state of judicial authority in India prior to the present cases. For as regards the Punjab, it is true that, in the early days of the Chief Court, Judges have pronounced opinions in favour of the adoption under general Hindu Law; and in 1874, Melville and Thornton, JJ., pointed out that the turning point of the controversy was Mr. Justice Mitter's judgment of 1868. But after the first reported case in 1867, the decisions there have turned on the popular customs into which the Government had the prudence to inquire immediately after the annexation, and which they made the foundation of law. The Punjab, therefore, may be omitted in our estimate of judicial authority. The reasons against the validity of the adoption of an only son are contained in the three judgments of

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the learned Judges, Mitter, Markby and Westropp. The point has never come before this Board for decision. It has been alluded to in two cases but in so indirect a way that though the authority of the Board is relied on by both sides it is not available for either. The foregoing remarks represent all the light which has been thrown on the Smritis to which, after all, we must recur to decide the question.

In addition to the remarks already made on the bearing of Manu's texts, those of Mr. Justice Knox upon his silence are worthy of attention. Manu mentions three conditions for a good gift of a boy in adoption. The natural father must be in distress; the boy must be "similar," apparently meaning of the same caste with the adoptive father; and he must be affectionate. Nothing is said about his having brothers, which is now represented as a vital condition the breach of which is a sin, heinous crime as some writers have called it, and as annulling the transaction. It seems very unlikely that Manu should either have viewed it in that light, or with his very high notions of the value of the first-born should have overlooked the point altogether.

The crucial text is that of Vasishtha. He first states the parents' power in the most sweeping terms, and derives it from causes affecting every child that is born into the world. The power is to later ideas, whether Hindu or English, an extravagant one; but it accords with what we know of the early stages of other nations and probably did not shock the contemporaries of Vasishtha, though the sage Apastamba, who is perhaps of equal antiquity, denies the right to give away or sell a child (Prasna II, Patala 6, Khanda 13, paras. 6-11) (1). A man may sell his son—no restriction of purpose is expressed—or he may even abandon him. But then comes an injunction expressed in terms which may amount to a command or may be only a recommendation, *viz.*, that an only son should not be given or accepted. The first remark to be made upon this is akin to the one just made upon Manu. If Vasishtha intended to except an only son from the father's power to give in adoption, why did he not say so? It would have been much more simple. But he first states the power, and far greater powers, in the

(1) 'Sacred Books of the East,' Volume II., pp. 130, 131

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broadest terms, and then adds a qualification which is, to put it at the highest, in ambiguous terms. That looks much more like an appeal to the moral sense not to exercise the power than a denial of its existence. In this respect the case resembles that of the father's power to alienate family property, which indeed is the light in which Vasishtha seems to regard a son. The power is given, while the action is condemned in terms consistent with actual prohibition. After long controversy it has been settled by a great preponderance of Indian authority, culminating in a decision by this Board, that the power exists, and that the prohibition, though a solemn warning as to the spiritual responsibility of exercising it, is not efficacious in Law.

In examining this question their Lordships are again at great disadvantage in not knowing Sanskrit. In the absence of agreement among Sanskrit students, they cannot adopt the representations made, though by learned men, to the effect that as a matter of Grammar, Vasishtha's injunction imports admonition rather than command. So with respect to what has been called Jaimini's rule which is so much relied on by Chief Justice Edge. That author, who wrote in the 13th century, appears to have been received as a high authority in the interpretation of Smriti texts. He lays down the rule that all precepts supported by the assignment of a reason are to be taken as recommendations only. That, if sound, would be conclusive as to Vasishtha's text. But it is rather startling, and a very intimate acquaintance with the Smritis would be needed before admitting its truth. It has not been brought forward in any case prior to this case from Allahabad. It may, however, fairly be argued that one who, having the power to give an absolute command, gives an injunction not expressed in unambiguous terms of absolute command but resting on reason, is addressing himself rather to the moral sense of his hearers than to their duty of implicit obedience. So far Vasishtha's reason, founded as it is on temporal and not on religious considerations, gives some, though not very strong, support to the respondent's theory. The text of Saunaka is open to two obvious remarks. One is that the injunction not to give an only son is couched in the same terms as the injunction to give a son if there are more than two. The latter of these cannot possibly be obligatory.

The other remark is that, as Nanda Pandita in the Dattaka-Mimansa points out, Saunaka in effect prohibits a gift in adoption when there are only two sons ; and that is a prohibition which has never been regarded as obligatory. Saunaka does not help the appellants, but rather lends weight against them.

Then comes the Mitákshará. We have seen that Sir M. Westropp emphatically, and Sir W. Markby possibly, relies on the difference of expressions in Colebrooke's translation. The passages from their judgments have been quoted above, and so have the passages from the Mitákshará (Chap. I, Sec. XI, paras. 10, 11, 12,). Now it has been brought out in the arguments that precisely the same expressions of injunction are used by the author in these three paragraphs. To fortify their knowledge, their Lordships have inquired of one of the most eminent of Sanskrit scholars, Professor Max Müller, and he has courteously informed them that as a matter of fact, the three expressions are identical, and as a matter of Grammar are, in his judgment, equally capable of expressing obligation or recommendation. Now paragraphs 10 and 12 have been observed on before. It has been placed beyond dispute in point of law that neither is obligatory. It requires some good reason to show why, when the same expression is used in three consecutive sentences, it should be construed one way in the first and third and another way in the middle one. No such reason has been given. It is an unfortunate thing that in translating a law book, Celebrooke should have used different English words to represent the same Sansksit word. He has certainly misled at least one Judge in a leading case. As the matter is now shown to stand, the Mitàkshará must be taken to bear strongly against the appellants.

In intimating that Sir M. Westropp was misled by Colebrooke, their Lordships have not overlooked the fact that in 1889, Sir C. Sarjent thought that Sir M. Westropp was aware of the state of the Sanskrit text. It seems, however, next to impossible that Sir M. Westropp should have known that Colebrooke's variations of expression were not authorised by the original and should have said nothing about it; seeing that it deprives his emphatic reference to those variations of all meaning. If, indeed, he knew the state of the Sanskrit text and thought it so immaterial as not to deserve notice, he

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practically treated Colebrooke as the original authority, and his reasoning does not thereby gain but loses in force.

The material passages in the two Dattaka books have been indicated before, and remarks have been made on those which quote and comment on Saunaka. It seems to their Lordships that the authors, who bring in the older texts at every turn, did not mean to do more than repeat and enforce them. If they were clearly laying down any additional precepts or authoritative interpretations of ambiguities then, though, as Mr. Justice Knox points out, such comments should be received with some caution, they should also be received with due regard to the authority which the books have acquired. But on this topic, the writers seem anxious to found themselves entirely on the Smritis and to refer their readers back to them. Certainly on the crucial point now in issue they throw no light at all. They do not touch the question whether the injunction not to adopt only sons is a matter of positive law or only addressed to the moral sense. And yet Jaimini's treatise, written some centuries earlier than the Dattaka-Mimansa, must have made the later of the writers, if not both, familiar with the importance of that distinction.

It is, however, worth while to observe how Nanda Pandita deals with consequences of a forbidden adoption. He quotes Manu's requirement, that the adopted son should be "similar" and he says (Dattaka Mimansa, Sec. II, paras. 22, 23). "Hence it is established that one of a different class cannot be adopted as a son." In Sec. III. he recurs to that prohibition and asks, "should this rule be transgressed, what would be the case?" Then he deduces from texts of Saunaka and Kàtyayana that the adopted son shall not share in the inheritance, but shall be entitled to food and raiment. So that the adoption is not void, but the son of the wrong class is reduced to a claim for maintenance only. With this exception, which favours the appellant's theory, it seems to their Lordships that these two treatises leave the question exactly where it stands on the earlier authorities.

From both the Courts below we learn that there is no resentment excited by this kind of adoption. The District Judge of

Godavari says "the people have settled down under the law enunciated in 1862." He can hardly recollect the state of things prior to 1862, but his statement of the present state of things is founded on personal knowledge. Whether the people have settled down under the High Court decision, a result which is usually of very slow growth if it takes place at all, or whether, as is more probable, that decision was in accordance with the ordinary existing ideas and practice, we are told that in point of fact there is no conflict between the declared law and the feelings of the people. Nor is there any indication that there ever was such a conflict. In Allahabad, the parties are Agarwala Banias of Benares, who are, as two of the learned Judges below state, specially careful of caste and religious observance. The adoption was twenty years old and no caste penalties had followed it. These things do not prove a custom, but they do tend to prove that among orthodox Hindus, the adoption of only sons has never been so inculcated as a sin by their teachers as to excite abhorrence or social hostility, such as we know to follow some other breaches of their religious laws. That the practice is a frequent one is shown by the frequency of litigated cases, which must be quite insignificant in number as compared with those that actually occur, and from the establishment of customs authorising it in various places. This is not one of the cases in which people are tempted by appetite to break an acknowledged law. It is inconceivable that the choice of an only son for adoption can in any large number of cases proceed from any other cause than a conviction of its suitability to the circumstances. That is a family matter which a wise law-giver, while warning parties of their spiritual responsibility, would yet leave it possible for them to do. The Hindu sages appear to have taken that course in this and kindred matters.

Their Lordships then have a case before them of which the broad outlines are as follows. Old books, looked on as divine, give to the father plenary powers over his sons. The same books discountenance the giving of an only son in terms which may be construed as a positive command making the gift void or as a warning pointing out the mischief of the act but leaving individual men to do it at their peril. The books contain no express statement which kind of injunction is meant. The

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practice of such adoption is frequent. Over some substantial portions of Hindu society it is established as a legal custom, whatever may be the general law. In other very large portions it is held to be part of the general Hindu Law. Nowhere is it known to be followed by hatred or social penalties. Pausing there, the case is one in which if the authoritative precepts are evenly balanced between the two constructions, the decision should be in favour of that which does not annul transactions, acceptable to multitudes of families, and which allows individual freedom of choice.

But what says authority? Private commentators are at variance with one another; judicial tribunals are at variance with one another; and it has come to this that in one of the five great divisions of India, the practice is established as a legal custom, and of the four High Courts which preside over the other four great divisions, two adopt one of the constructions and two the other. So far as mere official authority goes, there is as much in favour of the law of free choice as of the law of restriction. The final judicial authority rests with the Queen in Council. In advising Her Majesty, their Lordships have to weigh the several judicial utterances. They find three leading ones in favour of the restrictive construction. The earliest of them (in Bengal, 1868) is grounded on a palpably unsound principle and loses its weight. The second in time (Bombay, 1875) is grounded in part on the first and to that extent shares its infirmity; and in part on texts of the Mitákshará which are found to be misleading. So that it too loses its weight. The third (Bengal, 1878) is grounded partly on the first, and to that extent shares its infirmity; but it rests in great measure on more solid ground, *viz.*, an examination of commentators and of decided cases. It fails, however, to meet the difficulty of distinguishing between the injunction not to adopt an only son and other prohibitive injunctions concerning adoptions which are received as only recommendatory; the only discoverable grounds of distinction being the texts of the Mitákshará, which are misleading, and the greater amount of religious peril incurred by parting with an only son, which is a very uncertain and unsafe subject of comparison. The judicial reasoning then in favour of the restrictive construction is far from convincing. That the earliest Madras decision rested in

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part on a misapprehension of previous authority has been pointed out; and the Madras Reports do not supply any close examination of the old texts or any additional strength to the reasoning on them. The Allahabad Courts have bestowed the greatest care on the examination of those texts, and the main lines of their arguments, not necessarily all the by-ways of them command their Lordships' assent. Upon their own examination of the Smritis, their Lordships find them by no means equally balanced between the two constructions but with a decided preponderance in favour of that which treats the disputed injunctions as only monitory and as leaving individual freedom of choice. They find themselves able to say with as much confidence as is consistent with the consciousness that able and learned men think otherwise, that the High Courts of Allahabad and Madras have rightly interpreted the law and rightly decided the cases under appeal.

Their Lordships have been reminded of the length of time for which the law must have been considered as settled in Bombay and Calcutta. A similar consideration affected the Courts of Madras and Allahabad and is remarked on by both. The time is not very long in any of the four provinces, but it is long enough to increase the gravity of the questions in these appeals. In estimating the weight of reasoning in the various litigated cases, their Lordships have not forgotten the weight of the actual decision; that they represent the opinions of eminent and responsible men, arrived at after public and anxious discussion, carrying with them an authority not legally disputable in the provinces under their jurisdiction, and it may be affecting many minds and many titles to property or to personal *status*. Such decisions are not lightly to be set aside. A Court of justice, which only declares the law and does not make it, cannot, as the Legislature can, declare it with a reservation of titles acquired under a different view of it. But their Lordships are placed in the position of being forced to differ with one set of Courts or the other. And so far as the fear of disturbance can affect the question, if it can rightly affect it at all, it inclines in favour of the law which gives freedom of choice. People may be disturbed at finding themselves deprived of a power which they believed themselves to

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possess and may want to use. But they can hardly be disturbed at being told that they possess a power which they did not suspect and need not exercise unless they choose. And so with titles. If these appeals were allowed, every adoption made in the North Western Provinces and in Madras under the views of the law as there laid down may be invalidated, and those cases must be numerous. Whereas in Bengal and Bombay, the law now pronounced will only tend to invalidate those titles which have been acquired by the setting aside of completed adoptions of only sons, and such cases are probably very few. Whether they demand statutory protection is a matter for the Legislature and not for their Lordships to consider. It is a matter of some satisfaction to their Lordships that their interpretation of the law results in that course which causes the least amount of disturbance.

Their Lordships will humbly advise Her Majesty to dismiss both appeals, and the appellants must pay the costs.

Appeals dismissed with costs.

MANIKYA MALA BOSE
v.
NANDA KUMAR BOSE.*

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(Reported in 4 C. L. J. 357; I. L. R. 33 Calc. 1306; 11 C. W. N. 12).

An adoption by a Hindu widow, who has succeeded by heirship in her character as mother to her son, after his death and the death of his widow, is invalid according to Hindu Law. A left a widow and an adopted son, and gave authority to the widow to take three sons successively in adoption, one after the death of another. The adopted son married and died leaving a childless widow, who succeeded to the estate. Upon the death of the adopted son, the widow of the original owner succeeded to the estate and took a second son in adoption :

Held, that the second adoption was invalid, inasmuch as the power of adoption come to an end and became incapable of execution when the estate vested in the widow of the first adopted son, and that such vesting was a proper limit to the exercise of the power.

The power was not revived upon the death of the widow of the first adopted son.

Bhooban Moyee v. *Ram Kishore* (1), *Padma Coomari* v. *Court of Wards* (2), *Thayammal* v. *Venkatarama* (3), *Taracharan* v. *Sureshchandra* (4), applied.

Krishna Rao v. *Shankar Rao* (5), and *Ram Krishna* v. *Sham Rao* (6), approved.

Bykant Monee v. *Kisto Soonderee* (7), dissented from.

Manik Chand v. *Jagat Settani* (8), distinguished.

Ram Soondar v. *Surbanee* (9), and *Kanneppalli* v. *Pucha* (10), explained and distinguished.

A testator left an adopted son and gave authority to his widow to take three sons in adoption one after the death of another. The will contained a provision that the adopted son shall succeed to the estate on the death of the testator, and that on the death of one adopted son and until the adoption of another son, the estate shall remain in the ownership and possession of the widow as ordinary heir, the estate to vest in the adopted son immediately on adoption :

Held, that the adopted son would take not a life interest but an estate of inheritance, subject to a condition of defeasance.

* *Present* :—Sir Francis William Maclean, K.C.I.E., Chief Justice, Mr. Justice Mookerjee and Mr. Justice Holmwood.

(1) (1865) 10 Moo. I.A., 279.
(2) (1881) L. R. 8 I. A., 229.
(3) (1887) L. R. 14 I. A., 67.
(4) (1889) L. R. 16 I. A., 166.
(5) (1892) I. L. R., 17 Bom., 164.
(6) (1902) I. L. R., 26 Bom., 526.
(7) (1867) 7 W. R., 392.
(8) (1889) I. L. R. 17 Calc., 518.
(9) (1874) 22 W. R. 121.
(10) (1906) 4 C. L. J., 171 ; 10 C. W. N., 921.

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Held also, that the executory gift over did not take effect.

Tagore v. *Tagore* (1), and *Narendranath* v. *Kamalbasini* (2), applied.

Appeal by the defendant.

Suit for declaration that an adoption is invalid.

The material facts and arguments appear from the judgment.

The judgment of the Court was as follows :—

MACLEAN, C. J.—I have had an opportunity of reading the judgment about to be delivered by Mr. Justice Mookerjee, and I only desire to say, that I entirely agree.

MOOKERJEE, J.—The facts which have given rise to the litigation out of which the present appeal arises, are not disputed before us. One Chandra Kumar Bose, the brother of the plaintiff respondent, Nanda Kumar Bose, died on the 24th August, 1881, leaving a widow, Manikyamala, the first defendant to this suit, and an adopted son Aukhoy Kumar Bose. On the day of his death, Chandra Kumar executed a will by which he made a disposition of his properties and also authorised his widow to take three sons successively in adoption, one after the death of another. Aukhoy Kumar attained his majority, married, and died on the 25th January, 1893, leaving a childless widow Bidhumukhi. Bidhumukhi died in July, 1898, and shortly after, on the 29th August, Manikyamala, the widow of Chandra Kumar, took the second defendant Mohendra Chandra in adoption, professing to act in exercise of the power conferred upon her by the will of her husband.

The plaintiff commenced this action on the 8th June, 1904, for declaration that the adoption is invalid under the Hindu Law. The learned Subordinate Judge has made a decree in favour of the plaintiff, declaring that the adoption of the second defendant by the first defendant is invalid. The defendants have appealed to this Court, and on their behalf, the validity of the adoption has been sought to be maintained upon two grounds, namely, *first*, that upon a true construction of the will of Chandra Kumar, the adopted son took a mere

(1) (1872) L. R. I. A. Sup. Vol., 47.

(2) (1896) L. R. 23 I. A., 18.

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life interest, followed by a gift over to the widow of Chandra Kumar upon failure of the male issue of the adopted son, and consequently, the widow could divest her own estate by a second adoption; and, *secondly*, that as the adoption now in dispute was made after the death of the widow of the first adopted son, and at a time when the estate had reverted to the widow of Chandra Kumar, there was nothing under the Hindu Law to invalidate the second adoption.

The decision of the first question raised before us must depend upon the construction of the provisions of the will of Chandra Kumar. The first paragraph of the will authorises the widow to take three sons successively in adoption, one after the death of another. The second paragraph provides as follows:—

"My adopted son shall succeed to all the moveable and immoveable properties which I have. On the death of one adopted son and until the adoption of another son by my wife, all my properties shall remain in the ownership and possession of my wife as my ordinary heir, and after my wife has adopted another son, the properties shall vest in him."

The third paragraph of the will provides for the management of the estate during the minority of the adopted son, and lays down that the estate is to be made over to him when he attains majority. The learned vakil for the appellants contended that the adopted son took a life interest in the estate, and that, upon his death, the estate did not pass to his widow, but reverted to his adoptive mother. We are unable to accept this contention as well founded. Under section 82 of the Indian Succession Act, which was made applicable to Hindus by section 2 of the Hindu Wills Act, "Where property is bequeathed to any person, he is entitled to the whole interest therein of the testator, unless it appears from the will that only a restricted interest was intended for him"; this is substantially the rule laid down by the judicial committee in *Tagore* v. *Tagore* (1), where their Lordships observed that "if an estate were given to a man simply without express words of inheritance, it would in the absence of a conflicting context, carry by Hindu Law, (as under the present state of

(1) (1872) L. R. Sup. Vol. 47 (65).

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law, it does by will in England), an estate of inheritance." We feel no doubt that under the will of Chandra Kumar his adopted son took an absolute interest, subject to a condition of defeasance. The question, therefore, arises, whether the executory gift over took effect in the present case. In view of Sec. 111 of the Indian Succession Act, made applicable to Hindus by the Hindu Wills Act, 1870, and the decision of the Judicial Committee in *Norendra Nath Sircar* v. *Kamalbasini Dasi* (1), we must hold, that the gift over did not take effect. Here a legacy is given to the widow of the testator if a specified uncertain event, namely, the death of the adopted son of the testator shall happen; no time is mentioned in the will for the occurrence of that event; the legacy cannot, therefore, take effect, unless the specified uncertain event, namely, the death of the adopted son happens before the period when the fund bequeathed is payable or distributable. There was some discussion at the Bar as to the precise period when the fund bequeathed is payable or distributable in this case; it was suggested, on the one hand, that the period in question is the death of the testator, as laid down by the Judicial Committee in *Norendra Nath Sircar* v. *Kamalbrsini Dasi* (1); it was argued on the other hand, that the period of distribution is the time when the adopted son attains majority. It is immaterial for our present purposes which view is accepted, because the adopted son died not only after the death of the testator, but also after he had attained majority. In either view, therefore, the gift over did not take effect.

There is no foundation, therefore for the suggestion made by the learned vakil for the appellants, that the question raised before us is identical with the one left open by the Judicial Committee in *Bhooban Moyee* v. *Ram Kishore* (2), namely, the effect of a testamentary disposition by an adoptive father, under which he restricts the interest of his adopted son in his estate to a life interest, and limits it over to another adopted son of his own, if the first adopted son leaves no issue male or such issue male fails. We must hold, accordingly, that upon the death of Chandra Kumar, his estate vested absolutely in Aukhoy Kumar,

(1) (1896) L. R. 23 I. A., 18; I. L. R. 23 Calc., 563.

(2) (1865) 10 M. I. A., 279 (311).

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that upon the death of the latter, it vested in his widow Bidhumukhi, and that upon her death it reverted to Manikyamala as the heiress of her adopted son.

The second ground, taken before us, raises a question of some nicety which is not altogether free from difficulty. It is contended on behalf of the appellants, that inasmuch as the second adoption was made after the death of the widow of the adopted son, and at a time, when the estate had vested in the widow of the original owner, there was no bar to the second adoption, as it would divest the estate of the adoptive mother alone. It has been conceded before us, and in view of the decisions of the Judicial Committee in *Bhoobun Moyee* v. *Ram Kishore* (1), and *Padma Coomari* v. *Court of Wards* (2), it could not possibly be disputed, that the adoption would have been invalid, if it had been made during the life time of the widow of the adopted son, because during such period, the power of adoption was incapable of execution. The question, therefore, is reduced to this: whether the power of adoption, vested in the widow of the original owner, which, during the life time of her daughter-in-law, was incapable of execution, became extinguished upon the death of her adopted son when the estate vested in his widow, or, whether such power of adoption merely remained in abeyance and was revived and became capable of execution upon the death of her daughter-in-law, when the estate reverted to her. The solution of this question depends upon the principles deducible from a series of decisions of the Judicial Committee in which their Lordships had to consider the limits within which a power of adoption may be exercised by a Hindu widow.

The first case in which the question arose was that of *Bhoobun Moyee* v. *Ram Kishore* (1). One Gour Kishore died, leaving a son Bhabani and a widow Chandrabalee to whom he gave express authority to adopt in the event of his son's death. Bhabani married, attained his majority, and died leaving a widow but no issue. Chandrabalee then adopted a son, Ram Kishore, who sued Bhabani's widow, Bhooban Moyee to recover

(1) (1865) 10 Moo. I. A., 279 (311); 3 W. R., P. C., 15.
(2) (1881) L. R. 8 I. A., 229; I. L. R., 8 Calc., 302.

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the estate. The Judicial Committee held, that her estate could not be divested by the subsequent adoption.

Lord Kingsdown, in delivering the judgment observed, that although the deed of permission did not, in express terms, assign any limits to the period within which the adoption might be made, it was plain that some limits must be assigned. It is incontestable that the judgment is founded upon the proposition of law, that a widow's power of adoption is limited. The question is, what are the limits to be assigned; they are indicated in the following passage from the judgment:

"It might well have been, that Bhabani had left a son, natural born or adopted, and that such son had died himself, leaving a son, and that such son had attained his majority in the life time of Chandrabalee; it could hardly have been intended that after the lapse of several successive heirs, a son should be adopted to the great-grand-father of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been statisfied. But whatever may have been the intention, would the law allow it to be effected? We rather understand the judges below to have been of opinion, that if Bhabani Kishore had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to Chandrabalee, would have been *at an end*. But it is difficult to see what reasons could be assigned for such a result which would not equally apply to the case before us."

It is manifest from this passage that according to the Judicial Committee, when the son died, leaving a widow, the power of adoption, vested in the mother, came to an end. No doubt, in subsequent passages their Lordships observed that the adopted son had lived to an age which enabled him to perform all the religious services which a son could perform for a father, and, also, that the unlimited estate which the son had taken, having vested in his widow, a new heir could not be substituted by adoption, so as to defeat that estate. These are, however, additional reasons in support of their Lordships' conclusion that the adoption was invalid, and do not, in any way, weaken the effect of the reason first set forth. That this is the true view of the effect of the decision, is proved conclusively

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by the case of *Padma Coomari* v. *Court of Wards* (1), which arose out of the same adoption. Ram Kishore got into possession of the properties left by Gour Kishore after the deaths of Bhuban Moyee and Chandrabalee. He was sued for its recovery by a distant relation of Gour Kishore, who would be entitled to succeed if the adoption of Ram Kishore was invalid. The High Court held, *Puddo Kumaree* v. *Jagut Kishore* (2), that the Judicial Committee had not decided that the adoption was invalid, but merely that, by the adoption of Ram Kishore, the estate vested in Bhuban Mayee was not divested, which was also the view adopted in the case of *Ram Soondur* v. *Surbanee Dossee* (3). The case then went before the Privy Council, and the Judicial Committee negatived this view of the effect of their previous decision, *Padma Coomari Debi* v. *Court of Wards* (1). Their Lordships pointed out that they considered the previous decision to be, that upon the vesting of the estate in the widow of Bhabani, *the power of adoption was at an end and incapable of execution*. They, further, added that the vesting of the estate in the widow, if not in Bhabani himself as the son and heir of his father, *was a proper limit to the exercise of the power*. This language is repeated and emphasised by their Lordships in their judgment in *Thayammal* v. *Venkatarama* (4), where it was stated that the survival of the son's widow and the vesting of the estate in her put an end to the right of his mother to adopt a son to his father. Their Lordships further expressed their entire concurrence in the view of the law laid down in *Padma Coomari* v. *Court of Wards* (5) and with reference to the passage from that judgment already mentioned, observed that nothing can be clearer or more explicit than the language used by the Committee in that case". Substantially the same view was reaffirmed in *Tarachurn Chatterji* v. *Suresh Chandra Mukherji* (6). In view of these decisions of the Judicial Committee, it is impossible for us to uphold the contention of the appellants,

(1) (1881) L. R. 8 I.A., 229 : I. L. R. 8 Calc., 302.
(2) (1871) I. L. R. 5 Calc. 615 at pp. 642, 643.
(3) (1874) 22 W. R., 121.
(4) (1887) L. R. 14 I.A., 67 at p. 70 ; I. L. R. 10 Mad. 205.
(5) (1881) L. R. 8 I. A., 229 ; I. L. R. 8 Calc., 302.
(6) (1889) L. R. 16 I. A., 166 ; I. L. R. 17 Calc., 122.

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that their Lordships intended merely to decide that the power of adoption vested in the mother did not come to an end but remained suspended during the life time of the widow left by the son. The effect of the decisions of the Judicial Committee was considered by the Bombay High Court in *Krishnarav* v. *Sankarrav* (1), and we agree in the view taken by the learned Judges who decided that case, the facts of which were very similar to those of the case before us. The question was further considered by a Full Bench of the Bombay High Court in *Ramkrishna* v. *Shamrao* (2), in which Mr. Justice Chandravarkar, after an elaborate review of the authorities, observed that the language of the judgment in *Bhoolun Mayee's* case (3) is so explicit, that it is impossible to construe it otherwise than as meaning, that there is a limit to the period within which a widow can exercise her power of adoption, and that once that limit is reached, the power is at an end. The learned Judge expressed his concurrence with the view of Sir Charles Sargent in *Hasabai's Case* (1), that the language of the Privy Council is altogether inconsistent with any idea of the right to adopt being merely suspended during the widow's life, and concluded, that where a Hindu dies, leaving a widow and a son, and that son dies leaving a widow, the power of adoption vested in the former widow was extinguished, and could never afterwards be revived. The same view is indicated in the judgment of Mr. Justice Ranade in *Venkappa* v. *Jivaji* (4), where that learned Judge observed, that a widow, succeeding as heir to her son, is competent to adopt, only when that son has left neither widow nor issue. Upon a review then of the authorities, we must over-rule the contention of the appellants, that the widow's death is the limit of time within which, and the failure of male issue in the male line and the vesting of the estate in the widow, are the only two conditions subject to which the power may be exercised, no matter whether the estate vests in the adopting widow just after the death of the son or after the death of the widow of the son. The learned vakil for the appellants placed

(1) (1892) I. L. R. 17 Bom., 164.
(2) (1902) I. L. R. 26 Bom., 526.
(3) (1869) 10 Moo. I. A., 279.
(4) (1900) I. L. R. 25 Bom., 306 (310).

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considerable reliance upon the decisions of this Court in the cases of *Bykant Monee Roy* v. *Kisto Soonderee Roy* (1), *Manik Chand* v. *Jugat Settani* (2), and upon the decision of the Judicial Committee in *Kannepalli* v. *Pucha Venkataramana* (3). In the first of these cases, an adoption, made under circumstances very similar to those of the present case, was upheld by this Court. It does not appear to have been argued, whether the fact that the adoptive mother made the adoption after the death of her daughter-in-law distinguished the case from that of *Bhoobun Moyee* v. *Ram Kishore* (4). But it appears to have been assumed, that all that the Judicial Committee intended to decide was that the widow was competent to adopt if she divested the estate of no one but herself. That this was the prevailing view of the effect of the decision of the Judicial Committee, is made clear by the cases of *Ram Soondur* v. *Surbanee* (5), and *Puddo Kumaree* v. *Jugat Kishore* (6). That the view is erroneous, we now know from the decision of the Judicial Committee in *Padma Coomari* v. *Court of Wards* (7). It follows accordingly, that the decision in *Bykant Monee* v. *Kisto Soonderee* (8) is inconsistent with the decisions of the Judicial Committee in *Padma Coomaree* v. *Court of Wards* (7), and *Thayammal* v. *Venkatarama* (9), and is therefore not binding on this Court. As regards the case of *Manik Chand* v. *Jugat Settani* (10), no doubt, there are certain observations in the judgment which may tend to lend some apparent support to the contention of the appellants; but the learned Judges seem to have recognised that according to the decision of the Judicial Committee in *Padma Coomari* v. *Court of Wards* (7), the power of adoption *is at an end* and incapable of execution when the estate vests in the widow of the son, and they held this

(1) (1867) 7 W. R., 392.
(2) (1889) I. L. R. 17 Calc., 518.
(3) (1906) 4 C. L. J., 171 ; 10 C. W. N., 921.
(4) (1865) 10 Moo. I.A., 279 ; 3 W. R. P. C., 15.
(5) (1874) 22 W. R., 121.
(6) (1879) I. L. R., 5 Calc., 615.
(7) (1881) L. R. 8. I. A., 229 ; I. L. R. 8 Calc., 302.
(8) (1867) 7 W. R. 392.
(9) (1887) L. R. 14 I. A. 67 ; I. L. R. 10 Mad. 205.
(10) (1889) I. L. R. 17 Calc., 518.

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principle to be inapplicable to the case before them (which was that of a Jain widow) on the ground that no power from the husband was necessary to the validity of the adoption. As regards the recent decision of the Judicial Committee in *Kannepalli* v. *Pucha Venkataramana* (1), it does not touch the question before us. It is argued, however, that it has the effect of considerably weakening, if not actually over-ruling, the earlier decision of their Lordships in *Bhoobun Moyee* v. *Ram Kishore*(2). No doubt, their Lordships quote with approval, a passage from the judgment of Mr. Justice Mitter in *Ram Soondur* v. *Surbanee Dossee* (3), in which that learned Judge had held that an adopted son by attaining an age of suffiicient maturity and by performing the religious services enjoined by the *shastras* can not exhaust the whole of the spiritual benefit which a son is capable of conferring upon the soul of his deceased father. This, no doubt, militates against the view taken in the case of *Bhoobun Moyee* v. *Ram Kishore* (2), to which their Lordships' attention does not appear to have been invited, namely, the view, that all the spiritual purposes of a son may, under certain circumstances, be taken to have been satisfied. But their Lordships do not dissent from the view, that when the adopted son dies, leaving a widow, the power of adoption given to the mother comes to an end. That their Lordships could not have intended to dissent from or throw any doubt upon this view, is reasonably clear from the circumstance, that they do not make any reference to the earlier portion of the judgment of Mr. Justice Mitter in *Ram Soondur* v. *Surbanee Dossee* (3), in which that learned Judge had put a limited construction upon the decision of the Judicial Committee in *Bhoobun Moyee* v. *Ram Kishore* (2), which limited construction was expressly disapproved by their Lordships in *Padma Coomari* v. *Court of Wards* (4). We must further remember that the immediate question before the Judicial Committee in *Kannepalli* v. *Pucha Venkataramana* (5), was whether upon the death of the first adopted son, when

(1) (1906) 4 C. L. J., 171 ; 10 C. W. N. 921.
(2) (1865) 10 Moo. I. A., 279 ; 3 W. R. P. C., 15.
(3) (1874) 22 W. R., 121.
(4) (1881) L. R. 8 I. A., 229 ; I. L. R. 8 Calc. 302.
(5) (1906) 4 C. L. J. 171 ; 10 C. W. N. 921.

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little more than two years of age, it was competent to the widow to take a second boy in adoption: it was held, that the authority to adopt was not exhausted by the first adoption, which view does not in any way conflict whith the rule laid down in any of the earlier cases before the Judicial Committee. On the other hand, the case of *Rajah Velanki* v. *Venkatarama* (1), shews that an adoption of a son after the death of one son, is valid.

On these grounds, we must hold that the adoption of the second defendant by the first defendant, after she had succeeded as heir to her first adopted son after his death and that of his widow, is invalid.

It has been conceded before us that there is nothing in the original texts of the Hindu Law which deals with the question raised before us or touches the matter directly. But it was much pressed upon us that the principle laid down by the Judicial Committee, does not accord with the spirit of the Hindu Law, as expounded in the books or understood by the Hindus themselves. It is not open to us, however, to go into that question, as we are bound by the law, as laid down in *Bhoobun Moyee's Case* (2), and as expounded and re-affirmed in the later decisions of the Judicial Committee. The appeal consequently fails and must be dismissed with costs.

HOLMWOOD, J.—I entirely agree.

Appeal dismissed.

(1) (1876) L. R. 4 I. A., 1; I. L. R. 1 Mad. 174.

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August, 28.

BHUPATI NATH SMRITITIRTHA

v.

RAM LAL MAITRA.*

[*10 C. L. J. 355 ; 14 C. W. N. 18.*]

Held by the Full Bench—The rule which requires that for the validity of a gift, the relinquishment must be in favour of a sentient being does not apply to bequests to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death. Such disposition is for religious purpose and is valid under Hindu Law.

Per Mookerjee J.—It cannot be assumed that a Hindu diety is a Juridical person for all purposes, and stands on precisely the same footing capable of the same rights and subject to the same liabilities as an ordinary sentient being.

In the case of donation after the owner has parted with his rights and before the subject matter has been accepted, the property is in a peculiar position, so that when the term "property" is used in relation to what has been dedicated to the deity, it has a secondary sense different from what it bears when used in relation to persons. According to strict juridical notions there can be no gift in favour of the gods. When a dedication is made in favour of the deity, the owner is divested of his rights and the king is the custodian of all such property.

Per Chatterji J.—A particular image may be insentient until consecrated but the deity is not. If the image is broken or lost another may be substituted in its place and when so substituted, it is not a new personality but the same deity, and properties previously vested in the lost or mutilated Thakoor became vested in the substituted Thakoor.

Appeal by the Plaintiff.

Suit by the sons of the Guru for a construction of the testator's will, for a declaration that the trust for the establishment and consecration of the image of the Goddess *Kali* and her worship was void, for possession of certain properties and for an account and mesne profits.

The facts sufficiently appear from the Order of Reference.

The case first came on for hearing before Mr. Justice Mitra and Mr. Justice Bell who referred it to a Full Bench on the 24th July, 1908, by the following

* *Present*:—Sir Lawrence Jenkins, K.C.I.E., Chief-Justice, Mr. Justice Stephen, Mr. Justice Mookerjee, Mr. Justice Coxe and Mr. Justice Chatterjee.

* Full Bench Reference in appeal from Original Decree No. 25 of 1906.

ORDER OF REFERENCE.

1902.

Bhupati Nath Smrititirtha v. Ram Lal Maitra.

MITRA, J.—There is now no doubt as to the facts. Umes Chandra Lahiri died on the 28th June 1890, having made his last will on the 29th June, 1890. He left him surviving his widow Broja Kumari, his mother Anandamoyi, a sister Iswamba and a cousin-sister Bhagabati. They are now dead. Broja-kumari died on the 27th January 1894. Her husband had by his will given her authority to adopt three sons in succession, one in default of the other, but she did not exercise her authority. The seventh defendant Hemchandra Lahiri is now admittedly the testator's heir-at-law, if the true construction of his will leads to a conclusion of intestacy after the widow's and mother's death. The plaintiffs are the sons of the testator's *guru* (spiritual preceptor) Harinath Bhattacharjee who died either in December 1892 or January, 1893, *i. e.*, about a year before the widow's death.

One of the provisions made by the testator in this will was that, if at the death of his widow, no son or adopted son existed capable of taking his property, the executors named in his Will would establish an image of the Goddess Kali in the name of his mather Anandamoyi, and the surplus income left after the worship of the family deities, Iswar Gopal Deb, Saligram Narain and Iswar Mohadeb, should be devoted to the worship of the Goddess to be called Anandamoyi Kali. In accordance with this direction, the executors established and consecrated in the month of October or November 1894, an image of the Goddess made of earth, and later on, in the year 1899, replaced the image by one made of stone and had a temple built for its location. They thus carried out the directions in the will, and the worship has ever since been duly carried on.

The testator, however, added a direction in his will that "if, for any reason, the image of Iswar Kali Debi is not established and if the income of my properties is not used for her *seba* and worship, then my *gurudeb* and his sons, grandsons, etc., in succession shall get my Rangpur properties and possess the same, in absolute right from generation to generation with right to sell or make a gift thereof." A similar provision was made with respect to some other properties in favour of the testator's *purohit* (priest).

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The present suit was instituted by the sons of the *guru* on the 4th July, 1904, for a construction of the testator's will, for a declaration that the trust for the establishment and consecration of the image of the Goddess Kali and her worship was void; for possession of the Rangpur properties and for an account and mesne profits. Some of the defendants are the surviving executors and trustees. The defendant, Sarat Chandra Maitra, was entitled to an annuity under the will. Hem Chandra Lahiri and the legal representatives of some of the deceased executors and trustees are also parties to the suit. The suit was defended by the surviving executors and trustees.

On the question of the validity or otherwise of the bequest relating to the Goddess Kali, the lower Court was of opinion it was valid, and it accordingly dismissed the suit. The plaintiffs have appealed from the decision of the lower Court, and the first and the most important question raised for our consideration refers to the validity of this bequest. The question is one of some difficulty as it involves the consideration of the wider question, does the text or phrase "relinquishment in favour of the donee who is a sentient person" in Chapter I, paragraph 21 of the Dayabhaga of Jimuta Vahana, the text which is the foundation of the doctrine of Hindu Law that a gift to an unborn is invalid, render a bequest for religious purposes invaild, when the physical manifestation of the Hindu deity for whose worship the bequest is made was not in existence at the time of the testator's death ?

In the *Tagore case* (1), the judicial Committee of the Privy Council was dealing with the case of gifts to human beings and applying the rule laid down in the Dayabhaga, Chapter I, paragraph 21, their Lordships came to the conclusion that in order to make a gift under a will valid, the donee, except in the case of an adopted child or a child *en ventre sa mere*, must be a person in existence capable of taking at the time the gift takes effect.

The reason for the exception in favour of child in embryo as given by Willes, J., who delivered the judgment of the Judicial Committee, was that by a rule generally adopted in

(1) (1872) 9 B. L. R., 377.

jurisprudence, children in embryo who afterwards come into separate existence are included in the class of sentient beings. The reason given for the inclusion of an adopted son was that in contemplation of Hindu law, such a child is begotten by the father on behalf of whom he is adopted and is by a fiction of law supposed to be in embryo at the time of the death of the person who has given an authority to adopt either by a deed of adoption, or by a will. A Hindu deity is, in the contemplation of Hindus, always in existence; the establishment and consecration of a visible image is merely a physical manifestation. The idea of the birth of any of the deities of the Hindu pantheon at the present age or of any deity being *non-sentient* is utterly opposed to the Hindu *Sastras* and Hindu religious notions. I do not, therefore, see why a gift to a Hindu deity should not be an exception in the same way as to a child in embryo or an adopted son.

Bequests for charitable purposes, such as bequests for feeding the poor, for the establishment and maintenance of schools, and for medical help to the sick, are much of the same character. The exact objects of charity are not ascertainable at the time of the testator's death and the objects themselves must always be fluctuating. Trustees hold property for charitable purposes. The objects of charity, though not definitely ascertainable at any time, are always in existence, and bequests for charitable purposes have always been held to be valid.

In *Upendra Lal Boral v. Hem Chundra Boral* (1), however, a bequest or dedication of property to a Hindu deity whose image was to be established and consecrated after the death of the testator by his executors or trustees was declared to be void. The learned Judges who decided the case were of opinion that although there could be no doubt that the deity was always in existence, there could be no deity as such capable of accepting gifts until the deity was personified, and they relied on the *Tagore case* (2) and *Bai Mativahu* v. *Bai Mamubai* (3). Neither of these cases, however, refers directly to gifts to deities.

(1) (1897) I. L.R., 25 Calc. 405.
(2) (1872) 9 B. L. R. 372.
(3) (1897) I. L. R., 21 Bom., 709 ; L. R. 24 I.A., 93.

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The decision in *Upendra Lal Boral* v. *Hem Chandra Boral* (1) was followed by Stanley, J., in *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (2) and by Stephen, J., in *Nogendra Nandini Dassi* v. *Benoy Krishna Deb* (3) and in *Promotha Nath Roy* v. *Nagendra Bala Choudhurani* (4), the learned Judges (Casperz and Coxe, JJ.) were inclined to follow these decisions.

A different view, however, appears to have been taken by Sale, J., in *Profulla Chandra Mullick* v. *Jogindra Nath Sreemany* (5). It was held in that case that a bequest of property to trustees for the performance of the worship of deities to be established and consecrated periodically was valid. In a large number of cases cited before us, the validity of bequests for the performance of worships after the periodical establishment and consecration of images of deities such as Durga and Kali and for the construction of temples and establishment of images was not questioned, and Sale J. had himself followed the practice without question in a previous case *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (6). The validity of bequests for the performance of periodical worships of deities like Durga, Kali, etc., has in fact never been questioned, though it is well known that their worships are performed, after images are made and consecrated. I do not see my way to make any distinction in principle betweeen an image of a deity to be permanently established and an image to be established and consecrated and worshipped for a time and then submerged in water.

An image of a deity may be broken or destroyed, and it is often necessary to replace it by another image and then to consecrate it. Notwithstanding the establishment of a new image, the essence of the deity which in contemplation of law is a juristical person in eternal existence is supposed to be the same as it was in the old image. It will be difficult to hold at the present day that on the mutilation or destruction of an image, an endowment lapses. A change in physical manifestation does not destroy the personality of a Hindu deity, neither does the

(1) (1897) I. L. R., 25 Calc., 405.
(2) (1901) I. L. R., 29 Calc., 261.
(3) (1902) I. L. R., 30 Calc., 521.
(4) (1908) 8 C. L. J., 489.
(5) (1905) 1 C. L. J., 605; 9 C. W. N., 528.
(6) (1897) I. L. R., 25 Calc., 112.

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establishment and consecration of an image bring, in the contemplation of Hindu Sastras, a juristical person into fresh existence capable of accepting a gift.

As a matter of fact, no Hindu deity is supposed, except by a fiction, to actually accept or enjoy the benefits arising out of use of property, in the sense these words may be used with respect to human beings. A gift to a deity is in substance a gift for charity, for the use generally of Brahmins or a particular Brahmin or his family, and the idea attached to such a gift is a charitable use coupled with spiritual benefit to the donor. An image is supposed to be necessary for worship, as the conception by man of a deity without a physical representation is psychologically impossible.

The correctness of the decision in *Upendra Lal Boral* v. *Hem Chundra Boral* (1), which has been followed in some of the later cases, has been questioned before us. There is also a want of harmony in the reported cases as to the application of the principle on which a gift to an unborn has been declared to be invalid. I have also grave doubts as to the correctness of the proposition of Hindu Law laid down in *Upendra Lal Boral* v. *Hem Chaudra Boral* (1) and followed in the later cases. I, therefore, refer tho following questions for decision by a Full, Bench:—

(1) Does the principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void ?

(2) Whether the cases of *Upendra Lal Boral* v. *Hem Chundra Boral* (2), *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (2) and *Nogendra Nandini Dassi* v. *Benoy Krishna Deb* (3) have been correctly decided so far as they lay down the proposition that a gift to a Hindu deity whose image is to be established and consecrated in future is void.

BELL, J.—I concur in the statement of the facts of the present case made by Mr. Justice Mitra, and I agree with him

(1) (1897) I.L. R., 25 Calc., 405. (2) (1901) I. L. R., 29 Calc., 261.
(3) (1902) I. L. R., 30 Calc., 521.

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that the questions of law set out by him should be referred to a Full Bench for decision.

Mr. H. D. Bose (with him *Babus Monmotho Nath Mookerjee* and *Ramakanta Bhattacharjee*) for the appellants.

The gift is invalid. The gift to the idol is a gift to the Supreme being whose বিগ্রহ (manifestation) is the *Thakur*.

[C. J.—Manifestation or emblem].

বিগ্রহ is the materialised deity. It is a consecrated image to which the gift is made. If the gift is not to *Kali* but for the worship of *Kali*, then the points referred to, do not arise. Here it was a gift for the worship of *Kali*. It is a gift not to *Kali* but to *Anandomoyi Kali* which is to be established.

[C. J.—"Bequest to trustees"].

If it is not established, then there is a gift over and the *Guru* takes.

[C. J.—No, the words are "if the image is not established and if the income of my properties &c."]

Assuming that there is nothing in the will for whose service the properties were dedicated, the provision that the income of the property is not to be used, is void. See *Shib Chunder Mullick* v. *Tripura Sundari Debi* (1).

A gift to an idol is not a gift to charity.

[C. J.—All gifts for religious purposes are gifts to charity].

If it is a gift to charity, every endowment is a public endowment. A dedication of the surplus without indicating the image is invalid.

[C. J.—The gift is for the worship of an idol and not to the idol].

In the contemplation of Hindu lawyers the consecrated image is the juristic person and not the deity.

(1) (1842) 1 Fulton, 98 at p. 106.

The case of *Upendra Lal* v. *Hem Chundra* (1) is on all fours with this case.

[C. J.—There was no personification of the deity in that case].

The image must be consecrated. Refers to देव प्रतिष्टा तत्त्व Before consecration it is a piece of clay.

C. J.—That case was distinguishable. You can not make a gift to *Kali* apart from any विग्रह or image].

Even in this case, the gift was made after dedication to *Kali*.

Babu Golap Chunder Sarkar (with him *Babus Mohini Mohun Chuckerbutty and Sib Chunder Palit*) for the respondents.

Whether the principle enunciated in the *Tagore* case (2) is applicable in the present case ?

In the ideal sense, the property belongs to the idol. A *shebait* can alienate. See *Prosunno Kumari's* case (3). This case was followed in *Maharaja Jagadindra Nath Roy* v. *Rani Hemanta Kumari Debi* (4). Referred also to the case of *Shibesowree* v. *Mathooranath* (5). An invisible deity can not be the owner. There must be some human being who can exercise ownership. Manu Chap. XI. verse 26 says: "That if any wicked person misappropriates God's property through covetousness, he will live in &c." Medhatithi says "God's property means property belonging to any degenerate person who habitually performs sacrifices." It does not indicate that God is the owner of the property in the same way as other human being. Image is simply the means of worship. *Kali* and *Kali's* image are two different things. The will simply provides for the conduct of worship. Neither the consecrated

(1) (1897) I. L. R., 25 Calc., 405.
(2) (1872) 9 B. L. R., 372
(3) (1875) L. R., 2 I. A., 145 at p. 152.
(4) (1904) L. R., 31 I. A., 203 ; I. L. R., 32 Calc., 120, at pp. 140-141.
(5) (1869) 13 Moo. I. A., 270.

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image nor the deity accepts the gift. So far as the words of the will go there was no gift. Gods are not benefited in any way. Secular benefit was derived by some human being; the donor himself enjoys the spiritual benefit. There cannot be any gift to the image and the image cannot enjoy the gift. Referred to section 17, Act IV of 1882. On principle there can be no distinction between periodical worship of deities and worship of deities perpetually. Gifts by will for religious and charitable purposes are valid. See *Ramtonoo Mullick* v. *Ram Gopal Mullick* (1). There a gift was made for the erection of a temple. In the case of *Asutosh Dutt* v. *Durga Churn* (2), the direction was as regards *Durga Pooja &c.* Their Lordships held that the direction should be carried out. Read the case of *Hemangini* v. *Nobin Chandra* (3), where *Durgotsab* was mentioned. In *Gokool Nath* v. *Issur Lachman* (4) the testator directed a *Shib Thakur* to be established. All the leading counsels engaged in that case did not think of raising this question. In the case of *Bhuggobutty Prosonno* v. *Gooroo Prosonno* (5) a direction for *Durgotsab* was given. There was an appeal. See *Bisseswar Prasanno* v. *Bhagwati Prasanno* (6). The case of *Rojomoyee* v. *Troylukho* (7) is partly against me. Stephen, J., had not to decide the point in question. See also the cases of *Parbati* v. *Ram Barun* (8) and *Profulla Chunder* v. *Jogendra Nath* (9). The principle laid down in section 17 of the Transfer of Property Act ought to be applied to gifts for religious and charitable purposes made by a will. In the case of *Jairam* v. *Kuverbai* (10), the Court's order was that the directions should be carried out. There was no objection. In the case of *Manohar* v. *Lakhmiram* (11) a trust for Hindu idol was created for religious and charitable purposes. This Court as laid down in section 17 of the Transfer of Property Act, applied all gifts as for religious

(1) (1829) 1 Knapp, 245. (2) (1879) I. L. R., 5 Calc., 438.
(3) (1882) I. L. R., 8 Calc., 788 (bottom of page 804).
(4) (1886) I. L. R., 14 Calc., 222, (page 223 bottom), 229, 230 para 2.
(5) (1897) I. L. R., 25 Calc, 112 (114).
(6) (1906) 3 C. L. R. 606.
(7) (1901) I. L. R., 29 Calc., 260.
(8) (1904) I. L. R., 31 Calc., 895.
(9) (1905) I. C.L. J., 605.
(10) (1887) I. L. R., 9. Bom., 491.
(11) (1887) I. L. R., 12 Bom., 247.

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and charitable purposes. An opinion was expressed in *Roy Goberdhun* v. *Singessur* (1). Referred to Shastri p. 421. Raghunandan's Text प्रतिष्ठातत्त्व. It is the deity for whose worship the image is to be set up. No Hindu will accept the proposition that the endowment will lapse by reason of the image being broken. In *Upendra Lal* v. *Hem Chundra* (2), the expression "no personification of the deity" is not correct. Consecration of image can not be the birth of the image. God cannot be said to be unborn. The deity is in existence in the contemplation of law. All the cases after this did not decide this point. In the case of *Nagendra Nandini* v. *Benoy Krishna* (3), it was admitted that the gift was void. (See page 525). The case of *Upendra Lal* (2) is directly opposed to the case of *Gokool Nath* (4). The juridical person is the invisible deity and not the consecrated image. Generally the word used is अर्पण and not दान।

Mr. H. D. Bose in reply. Consecration is प्राणप्रतिष्ठा। According to Hindu notion it is to give life to clay &c. When the प्राणप्रतिष्ठा ceremony is performed, it is then capable of taking property. Deity comes and resides in that image. In Hindu marriages the presence of विग्रह is necessary. God is present everywhere. By using the words इहागच्छ इहतिष्ठ the image becomes a sentient being. The case of *Maharaja Jagadindra Nath* v. *Rani Hemanta Kumari* (5) has no bearing. There was no complete dedication. The beneficiary got the legal estate, although the charge was created in favour of the *Thakur*. All the cases except that of *Gokool Nath* (4) cited there were dedications to existing idols.

[MOOKERJEE, J.—See the case of *Ramtonoo Mullick* v. *Ram Gopaul Mullick* (6)].

[COXE, J.—What do you say with regard to cases relating to periodical consecrations ?].

In those cases the estate was in the hands of the heirs charged with the payment of expenses.

The following judgments were delivered

(1) (1881) 7 C. L. R. 277 ; I. L. R. 7 Calc., 52.
(2) (1897) I. L. R., 25 Calc., 405 (408).
(3) (1902) I. L. R., 30 Calc., 521.
(4) 1886) I. L. R., 14 Calc., 222.
(5) (1904) I. L. R., 32 Calc., 129.
(6) (1829) 1 Knapp., 216.

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JENKINS, C. J.—The questions referred for our determination are :—

(1) Does the principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void ?

(2) Whether the cases of *Upendra Lal Baral* v. *Hem Chundra Boral* (1), *Rojomoyee Dassee* v. *Troilokho Mohiney Dassi* (2) and *Nogendra Nandini Dassi* v. *Binoy Krishna Deb* (3) have been correctly decided so far as they lay down the proposition that a gift to a Hindu deity whose image is to be established and consecrated in future is void ?

The disposition which has led to this reference is contained in the will of Umesh Chandra Lahiri, and is in these terms :—

"*(Ka)*. All my properties shall be placed in the hands of Babu Ram Lal Maitra, son of the late Ram Chandra Maitra of Haripur and the grandsons of my father-in-law, Sriman Kali Prasanna Maitra, Sriman Chundra Maitra, Sriman Protap Chandra Maitra, Sriman Abhoy Govinda Maitra, etc., as trustees. They shall according to the provisions made in Para. 4 pay to the persons mentioned in that Para., their monthly allowances, as fixed by me : and shall defray the expenses for the performance of rites for the spiritual welfare of my mother, full sister and cousin (father's sister's daughter) : and shall pay to my Gurudev Srijukta Hari Nath Bhattacharjee of village Purbasthali, in the District of Burdwan Rs. 10 as "*Barshick*" and to my "*Purohita*" Srijukta Srish Chandra Chukerbutty of Salkeah, Rs. 5 as "*Barshick*" and after defraying the expenses for the *sheba* and worship during my turn, of the ancestral *ijmali* "*Bighraha*," Iswar Gopal Deb Thakur, Saligram Narain and Iswar Mohadeba Thakur, they shall spend the surplus income which may be left in the *seba* and worship of *Kali* after the name of my mother, *i. e.*, in the name of *Iswar Ananda Moyee Kali*. The image of the Deity shall

(1) (1897) I. L. R. 25 Calc. 405.
(2) (1901) I. L. R. 29 Calc. 260.
(3) (1902) I. L. R. 30 Calc. 521.

be established and consecrated at my dwelling house or at Kasi and in case of any of the persons mentioned in Para. 4 dies, then the allowance which I have fixed for him or her, during his or her life-time, shall, after his or her death, be spent for the worship of the said *Iswar Anandamoyee Kali.*

(*Kha*). If the said Ram Lal Maitra or any of the grandsons of my father-in-law dies, his heirs shall be appointed in his place, in order of seniority, and act according to the provisions made in Para. (*Ka*) and hold the estate as trustees. If any of those heirs be a minor, then his lawful guardian shall hold the estate during his minority: and when he will have attained his majority, then the estate shall pass into his hands as a trustee."

The will then goes on to provide that if for any reason the image of Iswar Kali Debi is not established and if the income of the testator's properties is not used for her *sheba* and worship then the testator's Gurudeb and his sons, grandsons etc., in succession should get his Rungpore properties and possess the same in absolute right from generation to generation.

The facts as found by the referring Bench are briefly these: Umesh Chandra Lahiri died on the 28th June, 1890, and in the events which have happened, Hem Chandra Lahiri became and now is his heir-at-law. It was not until 1894 either in the month of October or November, that the executors for the first time established and consecrated an image of the Kali. The image so established was in the first instance of earth but in 1899 it was replaced by one of stone and a temple was built for its location. The worship has ever since been duly carried on as provided in the will. All we have to consider is whether the fact that the image was established and consecrated for the first time after the testator's death invalidates the provisions in the will.

It is necessary to observe the precise character of this provision. It does not purport to be a simple gift of property to an image to be consecrated as was to some extent the basis of the appellant's argument before us: but the testator directed all his property to be placed in the hands of persons named by him and subject to certain payments these persons were directed to spend the surplus income which might be left in the *seba*

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and worship of *Kali* after establishing the image of the *Kali* after the name of his mother. Now this manifestly was a disposition for religious purposes and such dispositions are favoured by Hindu Law. Thus it is said by Katyayana "if a gift be promised by a person whether in health or sickness for a religious purpose, and he dies without making it, his son should be compelled to make it: of this there is no doubt." (See Mandlik's Hindu Law, page 124). And again in the chapter of the Mitakshara which deals with gifts it is said "whatever has been promised to anybody for religious purposes should be given to him without fail." (See Mitakshara Vyavahara Adhyay, Part III, Chapter IV, Section 14, translated by the late Girish Chandra Tarkalankar). "Property," it is said, "thus given by a man or appropriated (by him) to religious uses cannot be set aside by his son and the rest. The giver is competent to take care of the wealth or property endowed for religious purposes. He can no longer resume it because Dharma is the then master or owner of such property. Let the owner himself or his representative, O Goddess! appropriate to pious purposes the *corpus* of a property or its income according as it may have been resolved." (Mahanirvana-tantra, section 12, vv. 92—94). Other texts might be cited in support of this view, but it is unnecessary to elaborate this point.

And it is not in the texts alone that sanction is to be found for the view that dispositions for religious or charitable purposes are favoured: the leaning of the Courts too is in the same direction. Thus in *The Mayor of Lyons* v. *E. I. Co.* (1) it was said "Their Lordships are well aware that in pursuing this course they are sanctioning a proceeding for which there is no exact and complete precedent in the administration of charitable funds in this country; but in one respect there is sufficient authority, *viz.*, as far as regards a postponement of distributions and the not-declaring the gift void on account of any present difficulty in giving it effect: the case of *A. G.* v. *Bishop of Chester* (2) furnishes a direct authority for not-declaring a legacy void because it was for an object which could not at the time be accomplished and for retaining the fund in Court until it should

(1) (1836) 1 Moo. I. A. 175. (2) (1785) 1 Brown C. C. 444.

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be possible to apply it." Now had the direction in the testator's will simply been that the surplus income should be spent "in the *seba* and worship of *Kali*" it would, I think, clearly have been good, for the purpose would have been religious and the direction would not have been bad for uncertainty.

On the question of uncertainty we may look for *evidence* to the English decisions, [*Runchordas* v. *Parvartibai* (1)] and in England it has been held that gifts "for the worship of god" or "to be employed in the service of my Lord and Master" are good (*A. G.* v. *Pearson* (2) and *Powers-court* v. *Powers-court* (3) and *In re Darling* (4). Then does it invalidate the disposition that the discretion is for the spending of the surplus income in the *seba* and worship of *Kali* "after establishing the image of the Kali after the name of my mother." I think not: the pious purpose is still the legatee, the establishment of the image is merely the mode in which the pious purpose is to be effected [see *Mills* v. *Farmer* (5)] and the decision in *Ramtonoo Mullick* v. *Ram Gopaul Mullick* (6), shows that the pious purpose does not fail merely because the testator directs as a means of carrying it into effect that something should be done after his death [see too *Mayor of Lyons* v. *E. I. Co.* (7), and *Parmanandas Jivandas* v. *Vinayek Rao Wassudeo* (8)]. But then it is urged that the decision in *Upendra Lal Boral* v. *Hem Chundra Boral* (9) is against the validity of the disposition now under consideration. There apparently power was given by a testator to his wife to establish the service of an idol and by making a will in favour of it to manage the properties, construct a temple and perform the *seba*.

In relation to these dispositions it was said, "if there was a gift to the idol it was bad because there was no idol in existence at the time of his death." In the first place it is this decision that has principally led to the present reference so that it cannot be regarded as in itself an authority binding on us. Next it is to be noticed that the learned Judges did not consider the aspect of the case which I have been discussing, but treated

(1) (1899) I. L. R. 23 Bom. 725.
(2) (1817) 3 Mer. 353.
(3) (1824) 1 Mol. 616.
(4) (1896) L. R. 1 Ch. 50.
(5) (1815) 19 Ves. 483 (486).
(6) (1829) 1 Knapp. 245.
(7) (1836) 1 Moo. I. A. 175.
(8) (1878) I. L. R. 7 Bom. 19 (32).
(9) (1897) I. L. R. 25 Calc. 405.

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the disposition with which they were concerned as though it were a simple gift to a non-existent idol.

I have shewn that the disposition with which we have to deal in this case is something different from that.

But apart from that I think we should not regard the decision in *Upendra Lal Boral's case* (1) as affording any sufficient reason for holding the direction now under consideration as invalid.

That decision purports to rest on the authority of *Bai Motivahu* v. *Bai Mamubai* (2) where their Lordships after referring to the *Tagore case* (3) say. "Two rules applicable to the Will now under consideration are laid down in the judgment of the Committee: one is 'that a person capable of taking under a will must be such a person as would take a gift *inter vivos* and therefore must either in fact or in contemplation of law be in existence at the death of the testator" (p. 70). And it is said (p. 69). "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect from death they are generally so to be regarded as to the property which they can transfer and the person to whom it can be transferred."

Now turning to the *Tagore case* (3) we find that the rule against a gift to a person not in existence and capable of taking from the donor at the time when the gift is to take effect rests on the principle expressed in the Dayabhaga, Chap. IV, 21 by the phrase "relinquishment in favour of the donee who is a sentient person."

This passage in the Dayabhaga is used to illustrate the proposition that "the right of one may consistently arise from the act of another" and it is there pointed out in proof of this that in the case of donation the donee's right to the thing arises from the act of the giver: *namely from his relinquishment in favour of the donee who is a sentient person.*

The Privy Council evidently considered the latter of these two cases was governed by the earlier notwithstanding that to

(1) (1897) I. L. R. 25 Calc. 405.
(2) (1897) I. L. R. 21 Bom. 709; L. R., 24 I.A., 93.
(3) (1872) L. R. I. A. Sup. Vol. 47.

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the one the Mitakshara and to the other the Dayabhaga applied, and that in relation to the question involved in the text cited the contentions of the two schools are not in complete harmony. So it is immaterial that the referring Bench does not state which school of law applies. It is no doubt true that an idol has been frequently described as a juridical person and even as owning property [*Maharanee Shibesworee Debia's case* (1)] but it has since been explained that it is only in an ideal sense that property can be said to belong to an idol [*Prosunna Kumari Debya's case* (2) and *Maharaja Jogadindra Nath Roy's case* (3)]. Whether this ideal sense means more than that the dedication to a deity is a compendious expression of the pious purposes for which the dedication is designed may be a question.

In favour of this view we have the doctrine of Medhatithi cited to us in the course of the argument that the primary meaning of property and ownership is not applicable to God, and the train of reasoning that is suggested by the teaching of the Aditya Purana that the gods cease to reside in images which are mutilated, broken, burnt, and so forth (Saraswati's Hindu Law of Endowment, page 129).

But whatever may be the true view on this obscure and complex question this at least seems clear that the rule which requires relinquishment should be to a sentient person does not forbid the gift of property to trustees for a religious purpose though that person cannot in strictness be called a sentient person [*Ramtonoo Mullik's case* (4).] It would seem that the rule propounded by Jimutavahana had regard rather to the general proposition for which he was contending, *i. e.*, that the act of the giver is the cause of property, than to its application to particular objects of benevolence. The fiction that an idol is a person capable of holding property, must be kept within its proper limits, and were we to accede to the argument that has been advanced before us, we should be allowing fiction to be built on fiction to the hinderance and not for the furtherance of justice.

In my opinion, therefore, the reference should be answered by saying that the principle expressed by the phrase "relinquish-

(1) (1869) 13 Moo. I. A. 270.
(2) (1875) L. R. 2 I. A. 145.
(3) (1904) L. R. 31 I.A. 203 (209).
(4) (1829) I Knapp. 245.

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ment in favour of the donee who is a sentient person" does not apply to the direction contained in the testator's will that the persons indicated by him shall spend the surplus income in the *seba* and worship of Kali after establishing the image of the Kali after the name of the testator's mother, and that if and so far as the cases cited in the reference conflict with this view, they have not been correctly decided.

STEPHEN, J.—In this case I have had the advantage of reading the judgments of my colleagues before writing my own. I agree with their conclusions and concur in their reasons and have in fact nothing to add to what they have said. But by reason of the importance of the case, I wish to explain briefly how the matter presents itself to me, relying on my brothers Mookerjee and Chatterjee for the contents of the Hindu Texts which are of prime importance in the decision of the question before us.

There is no doubt in the first place that dedication by a Hindu of property to a deity is not only lawful, but commendable in a high degree. But the question arises, what is the legal effect of such a dedication. A gift consists of two parts, abandonment of rights over the subject-matter of the gift by the donor, and acceptance of those rights by the donee. In a dedication to a deity, the abandonment by the donor takes place according to the ordinary law; but there can be no acceptance by the deity. Why this should be so, may be a matter that we need not enquire into; but the fact appears to me to be explained by two self-evident propositions, namely, that it is a contradiction in terms, to talk of the creator accepting anything in the legal sense of the word, from a creature, and that it is inconceivable that laws which were made for, if not by, men should be applicable to a deity. But though a dedication to a deity does not constitute a gift, it has a legal effect. The intention of the donor is that the subject-matter of the gift shall be used for doing honour to the deity by worship, and for conferring benefit on the worshippers and the ministers of the deity who conduct it. This worship is properly and I understand necessarily carried out by having recourse to an image or other physical object, but the image is nothing till inspired by the deity. It is the duty of the sovereign to see that the purposes of the dedication are carried out.

On, and, consistently with, this basis of general principles, modern law has arrived at certain conclusions. Of these the most important for present purposes is that an idol after it has been duly constituted is a juridical person in an ideal sense. The practical meaning of this somewhat elusive expression is that the ministers of an idol have over the property dedicated to the idol, which is the same thing as the deity inspiring the idol, the same rights that they would have if they were trustees for his benefit, or if he was an infant and they managers on his behalf, being at the same time liable to corresponding duties legally enforceable. This seems to me to show that such a dedication as the present is a devise for a religious purpose such as on the authorities referred to by my learned brothers would be recognised as valid by English law, and not considered as bad for uncertainty.

The above considerations leave no room, in the case of a dedication to a deity, for the application of the rule as to the invalidity of gifts other than to sentient being laid down in the *Tagore case*, and it follows that the present case, and the subsequent cases quoted in the reference before us must be held to have been wrongly decided.

MOOKERJEE, J.—The two questions of law which have been referred for decision by the Full Bench have been formulated in the order of reference in the following terms :

1. Does the principal of Hindu Law, which invalidates a gift other than to a sentient being capable of accepting it, apply to bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void ?

2. Whether the cases of *Upendra Lal Boral* v. *Hem Chundra Boral* (1), *Rojomoyi Dassee* v. *Troylokho Mohiney Dassi* (2) and *Nagendra Nandini Dassi* v. *Raja Benoy Krishna* (3) have been correctly decided so far as they lay down the proposition that a gift to a Hindu deity whose image is to be established and consecrated in future is void.

The will of the testator, upon the construction of which

(1) (1897) I. L. R. 25 Calc. 405. (2) (1901) I. L. R. 29 Calc. 261.
(3) (1902) I. L. R. 30. Calc. 521.

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these questions have arisen for consideration, directed that, in the event of the failure of a son or adopted son to the testator, after provision made for certain bequests, the executors were "to spend the surplus income which may be left, in the *sheba* and worship of Kali, after establishing the image of Kali after the name of my mother, that is in the name of Iswar Anandamoyi Kali; the image of the deity shall be established and consecrated at my dwelling-house or at Kasi."

The plaintiffs commenced the present action for construction of the will and for a declaration that the trust for the establishment and consecration of the image of the goddess Kali and her worship was void inasmuch as the deity had not been established in the life time of the testator.

We have been invited by the learned Counsel for the appellants to answer the questions stated in the order of reference in the affirmative. It has been argued upon the authority of the decisions of the Judicial Committee in the cases of *Tagore* v. *Tagore* (1), and *Bai Mativahu* v. *Bai Mamubai*, (2) that a person capable of taking under a will must be such a person as can take a gift *inter vivos*, and, therefore, must either in fact or in contemplation of law be in existence at the time of the death of the testator. It has been assumed that this rule is applicable to a bequest to trustees for the establishment of a Hindu deity, and the inference has been drawn that the manifestation of the deity in the form of an image must be in existence at the time of the death of the testator. As reliance has been placed upon two decisions of the Judicial Committee, which, in so far as they decide any questions of law, are binding upon this Court, it is essential to examine closely the decisions themselves, and to determine whether they are really applicable to the matter now under discussion. In this connection, it is useful to bear in mind the well known observation of Lord Halsbury in *Quinn* v. *Leathem* (3), that a case is only an authority for what it actually decides, and cannot be quoted for a proposition that may seem to follow logically from it.

In the case of *Tagore* v. *Tagore* (1), the question which

(1) (1872) L. R. I. A. Sup. 47, (67); 9 B. L. R. 377; 18 W. R. 359.
(2) (1897) L. R. 24 I. A. 93 (114); I. L. R. 21 Bom. 709; 1 C. W. N. 366.
(3) (1901) A. C. 495 at p. 506.

arose for consideration was as to the validity of testamentary bequests and gifts *inter vivos* in favour of human beings. With reference to this subject, their Lordships of the judicial Committee observed that the legal power of transfer under the Bengal School of Hindu Law applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the Dayabhagha, Chapter I, Para. 21, by the phrase "relinquishment in favour of the donee who is a sentient person." They then went on to add that by a rule generally adopted in jurisprudence, this class will include children in embryo, who afterwards might come into separate existence, and also by legal fiction an adopted son, who, in contemplation of law, is begotten by the father who adopts him, or for and on behalf of whom he is adopted; apart from this exceptional case which serves to prove the rule, the law was plain that the donee must be a person in existence capable at the time when the gift takes effect. It is not necessary for my purpose to investigate the precise scope of the passage of the Dayabhaga upon which reliance has been placed in support of the proposition that a gift to be valid must be in favour of a sentient person in existence and capable of taking from the donor at the time when the gift is to take effect. I shall assume this was the view adopted by Jimutavahana. The question, however, necessarily arises whether this doctrine is applicable to the case of bequests for the establishment of images of the deity and for their worship. To secure an answer in the affirmative to this question, it is argued that by a fiction of law an idol is a juridical person, and in support of this view reliance is placed upon the cases of *Shibesowree Debya* v. *Mathooranath Acharjo* (1), and *Prosunno Kumari Debya* v. *Golap Chand Babu* (2). The later decision of the Judicial Committee in the case of *Maharaja Jagadindra Roy* v. *Rani Hemanta Kumari Devi* (3), however, tends to indicate that this fiction must be employed cautiously and subject to many limitations. We must not, therefore, assume too readily that a Hindu deity

(1) (1869) 13 Moo. I. A. 270; 13 W. R., P. C., 18.
(2) (1875) L. R. 2 I.A. 145; 14 B. L. R. 450; 23 W. R. 253.
(3) (1904) L. R. 31 I.A. 203; I, L. R. 32 Calc. 129.

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is a juridical person for all purposes, and stands on precisely the same footing, capable of the same rights, and subject to the same liabilities as an ordinary sentient being, and we must closely examine the scope of the applicability of the passage in the Dayabhaga, which is the foundation of the argument that a bequest for the establishment of an image of a Hindu deity and for its worship is subject to the same rules as a bequest in favour of a human being.

The passage in the Dayabhaga which is supposed to go to the root of the matter is as follows:

"दृष्टं च लोकेऽपि दाने हि चेतनोद्देश-विशिष्टत्यागादेव दातृ-व्यापारात् सम्प्रदानस्य द्रव्ये स्वामित्वम्।"

Bharat Siromani's Edition, 1863, p. 25.

This is translated by Colebrooke as follows: "That is actually seen in the world, since in the case of donation, the donee's right to the thing arises from the act of the giver, viz., from his relinquishment in favour of the donee who is a sentient person." (Chapter I, Para. 21.)

In the very next passage Jimutavahana proceeds as follows:

"परस्वत्वापत्तिफलंहि दानरूपता, तच्च फलं सम्प्रदानाधीनम्।" p. 27.

This is translated by Colebrooke as follows:

"Gift consists in the effect of raising another's property and that effect here depends upon the donee." Chapter I, Para. 22.

On the first of these passages, Rambhadra comments as follows:—

"एतेन स्वामित्वफलोपहित-त्यागो दानमिति दानलक्षणं सूचितम्।"

"By this, 'gift is abandonment characterised by the result of ownership'—this definition of gift is indicated."

Sreenath comments as follows:

"एतेन स्वामित्व-फलोपहितं त्यागरूपं दानलक्षणमित्युक्तम्।"

"It is said hereby that the definition of donation is abandonment characterised by the result of ownership."

Sreekrishna comments on the passage as follows:

"त्यागमात्रात् वृषोत्सर्गादिरूपात् स्वामित्वाजन्मेति आह 'चेतनोद्देशेति'। 'उद्देशः स्वामित्वेन विषयता। सा च त्यागात्मिकायां इच्छाया एव इति।"

"As ownership does not arise from every act of abandonment *like the offering of a bull etc.*, he (the author) add

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'intended for some conscious being.' The intention must have for its object the ownership (of another), and this object is the object of the desire of abandonment."

On the second passage, Rambhadra comments as follows:

"अन्योद्देश्यकत्यागविषयस्य असामिकस्य ग्रहणं देवस्व-ग्रहणवत् प्रत्यवायात्, एतद्-विषयकमेव-'देवस्वं ब्राह्मणस्वं वा ये हरन्तीत्यादि वचनम्। अन्यथा चौर्यस्य पापहेतुत्वसिद्धौ ब्राह्मणस्व-हरण निषेधानर्थक्यम्। एवञ्चान्यथानुपपत्त्या स्वपद-हरणपदे लाक्षणिके।

"Since sin arises from the taking of property without any owner, which is the object of an abandonment intended for another, as from the taking of the property of the Gods. The passage of Menu 'those who steal the property of the Gods or the property of the Brahmans etc.' refers to this subject. Otherwise, as theft is already admitted as a case of sin, the prohibition of the stealing of a Brahmin's property becomes superfluous. Thus there being no other way to avoid this inconsistency, the terms property (स्व) and stealing (हरण) must be taken in a figurative or secondary sense.

It is clear from these passages, as well as from other passages from Sreenath, Achyutananda and other commentators on the Dayabhaga, that they understood the rule about the acceptance of a gift as a necessary condition for its validity as applicable to secular gifts alone. There is no foundation for the assumption that dedication to the deity or for religious purposes stands on the same footing. In fact, as Sreenath points out, an abandonment in favour of the deity is not comprehended within the term 'gift'. It is obvious from this that in the case of donation, after the owner has parted with his rights and before the subject matter has been accepted, the property is in a peculiar position, so that when the term "property" is used in relation to what has been dedicated to the deity, it has a secondary sense different from what it bears when used in relation to persons.

Again, Shulapani in his Sraddhabibeka discusses whether a *sradh* can be called a gift and in that connection observes as follows:

"न च दानरूपता, उद्देश्य-पित्रादि-गत-स्वामिवाजनकत्वात्। असामिकत्वञ्च पित्रादीनां-ममेदमिति स्वीकाराभावात्। आदित्यादिदेवतासर्गदानकदाने तु दान-शब्दो गौणः,

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तद्धर्मदक्षिणादानाद्यतिदेशार्थः। देवग्रामो हस्तिग्राम इत्यादि-प्रयोगस्तु गौण एव इत्युक्तम् तिर्यगधिकरणे।"

[Calcutta Edition, 1892, p. 25.]

Of this passage, the following version will give a fairly accurate idea :

(*Sradh*) has not the nature of a donation, as it does not generate ownership in the manes etc., for whom it is intended. The absence of ownership of manes etc., is due to the absence of acceptance on their part by the words "this is mine". In "Donation" having for its dative case, the gods like the Sun, etc., the term "donation" has a secondary sense. The object of his figurative use being extension to it of the inseparable accompaniment of that (gift in its primary sense), *viz.*, the offer of the sacrifical fee etc. It has already been remarked in the chapter on the *bratis* that such usage as Devagram, Hastigram etc., are secondary.

Upon this passage, Sreekrishna comments as follows :

"देवानां च इन्द्रादीनां अचेतनतया द्रव्य-स्वाम्यभावात्। तद्धिकथं देवग्राम इतिप्रयोगः, गौण इत्युक्तं तिर्यगधिकरणे।"

"The Gods, Indra, etc., being devoid of consciousness, cannot have ownership in any object. Then how can the expression Devagram (village of the Gods) be used. It has been remarked in the chapter on the *bratis* that the sense here is secondary."

Sreekrishna in his explanation of the term Devagram makes the following comments :

तथाचात्र स्व-स्वामिभावरूपसम्बन्धबाधात् मुख्य-प्रयोगः न भवत्येव। किन्तु तदुद्देश्य-कत्यागेषष्ठी लाक्षणिकी, तेन देवोद्देश्यकत्यागविषयो यामइत्यर्थः गौण इत्यर्थः।

"Moreover the expression cannot be used here in its primary sense. The relation of one's ownership being excluded, the possessive case affix (in Devas in the term Devagram) figuratively means abandonment for them (the Gods). Therefore, the expression is used in the sense of "a village, which is the object of abandonment intended for the Gods." This is the purport.

When we turn to the Suddhitattwa of Raghunandan, we find the subject of donation discussed. Thus, in one passage he observes as follows :

"तेन शास्त्रीय-सम्प्रदान-स्वत्वापादक-द्रव्य-त्यागो दानं।"

[Calcutta Edition, 1891, p. 308.]

"Thus donation is the abandonment of an object productive of the ownership of a person to whom it is given as prescribed the Sastras."

In another passage, he says again.

"एवञ्च त्यागात् निवृत्तमपि दातुः स्वत्वं सम्प्रदानायहणात् असत्यकृत्वेन तस्य अदानत्वश्रुतेः। p. 314.

"Thus, though the ownership of the donor ceases to exist in consequence of abandonment on account of the non-acceptance of the person to whom it is given, it is incomplete and consequently it is not regarded as a donation in the Vedas."

In a third passage Raghunandan makes the following remarks:

"ततश्च उद्देश्य-पात्र-विशेषो यदि न स्वीकरोति, तदा सोपाधित्यागविशेषस्य अनिर्व्वाहात् दातुः स्वत्वं निवर्त्तते, इति रत्नाकर प्रभृतयः। p. 308.

"Thus, if the particular person for whom a gift is intended does not accept it, then as the abandonment with all its conditions is not fulfilled, the ownership does not terminate. Such is the view of Ratnakar and others."

This indicates that in the case of dedication to the deity, the term "gift" or "donation" has properly no application at all. This is also supported by the following observations of Sree-Krishna in a passage of his commentary on the Sraddhabibeka.

"अत्र द्रव्यत्यागेन स्वत्वजनने सम्प्रदान-स्वीकारः प्राग्भावीऽपि सहकारी कल्प्यते।—अतएव उद्देश्य-पात्रविशेषो यदि पश्चात् न स्वीकरोति, तदा सोपाधित्यागविशेषस्यानिर्व्वाहात् न दातुः स्वत्वं निवर्त्तते इति रत्नाकरप्रभृतयोऽपि वदन्ति।"

[Calcutta Edition, 1892, p. 16.]

The following rendering gives a fair idea of the above passage.

"Here in the generation of ownership by the abandonment of an object, the pre-existence of acceptance by the person to whom the object is given is regarded as an auxiliary case... Therefore, if the particular person for whom a gift is intended does not accept it afterwards, then as donation with all its conditions is not accomplished, the ownership of the donor

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does not cease to exist. This is maintained by Ratnakar and others."

To the same effect is the following passage from the Mitákshára in which Vijnaneswara commenting on verse 27 of the Vyavaharadhyay of the Institutes of Yajnavalkya observes:

"अयमभिसन्धिः—स्वस्वत्वनिवृत्तिः परस्वत्वापादनं च दानम्। परस्वत्वापादनं च दानम्। परस्वत्वापादनं च परो यदि स्वीकरोति, तदा सम्पद्यते, न अन्यथा। स्वीकारश्च त्रिविधः, मानसः वाचिकः कायिकश्चेति।"

[Pombay Edition, 1813, Shaka, p. 129.]

"Gift consists in the relinquishment of one's own right and the creation of the right of another and the creation of the right of another man is completed on that other's acceptance of the gift and not otherwise. Acceptance is made by three things, mental, verbal, or corporal."

This is also amply borne out by passages from the Bhasya of Savaraswami on the Purbamimansa. In one passage Savara defines the characteristics of a gift as follows:

दानमित्युच्यते—स्वत्वनिवृत्तिः परस्वत्वापादनञ्च

[Adhyaya VI, pada 1, Asiatic Soc. Ed. Vol. I p. 742.]

"A gift is the cessation of the ownership of one and the generation of the ownership of another."

Savara, in another passage, observes as follows:

"देवग्रामो देवक्षेत्रम्—इति उपचारमात्रम्—यो यदभिप्रेतं विनियोक्तुमर्हति, तत्तस्य स्वं, न च यामं क्षेत्रं वा यथाभिप्रायं विनियुङ्क्ते देवता। तस्मात् न संप्रयच्छति इति, देवपरिचारकाणामस्तु ततो भृतिर्भवति, देवतां उद्दिश्य यत्त्यक्तम्।

[Adhyaya IX, pada 1, Asiatic Soc. Ed. Vol. II, p. 145.]

"Devagram (village of the Gods): Devakshetram (land of the Gods). These are figurative terms. What one is able to employ according to one's desire is one's property. The Gods, however, do not employ a village or land according to their use. *Therefore, no (body) gives (to the Gods.)* Whatever is abandoned with reference to the Gods becomes a source of property of the servants of the Gods."

Savara amplifies this view in the passage which follows, and which need not be quoted at length for our present purpose, and he repeats the same opinion in Chap. 6, section 1, Vol. I,

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page 606, when he speaks of the Gods as (अनीशानाधनस्य), that is, not capable of possessing wealth, and explains the expressions *Dhanagram* and *Hastigram*, as उपचारमात्रम्, *i. e.*, as merely figurative terms. See also Adhyaya IX, pada 1, Vol. II, p. 141, where Savara asserts that there can be no gift to Gods, as they have not body and are incapable of enjoyment. [न हि अविग्रहाय अभुञ्जानाय च दानं भोजनं वा सम्भवति]

This view is supported by Medhatithi, the oldest and most authoritative of the commentators of Menu. Sastri Golap Chandra Sarkar on behalf of the respondent relied upon the following verse of Manu and the commentary of Medhatithi thereupon. [Mandlik's Edition p. 1354].

दैवस्वं ब्राह्मणस्वं वा लोभेनोपहिनस्ति यः ।

स पापात्मा परे लोके श्वगृध्रोच्छिष्टभुग् भवति ॥ ११,२६ ॥

That wicked man who misappropriates God-property (God's property) and Brahmana-property lives in the next world by the leavings of vultures. [Menu XI, 26.]

मेधातिथिः ।

१ । यागशीलानां त्रयाणां वर्णानां यद्धनं तद्दैवस्वं, ब्राह्मणस्याऽयागशीलस्यापि यत् स्वं तद्ब्राह्मणस्वमिति ।

MEDHATITHI'S COMMENTARY.

1. The property of persons of the three regenerate tribes, that are in the habit of performing sacrifices, is (to be understood by the term) "God-property" (in this text, it is a compound word in the original, in which the word God is not inflected) ; and the property of a Brahmana who is not in the habit of performing sacrifices is "Brahmana-property,"

२ । एवमपि श्लोको गच्छत्येव । अर्थवादश्लोकोऽसौ ।

2. Even in this manner this verse may certainly be explained. This sloka (verse) becomes (then) a laudatory one.

३ । धनं यज्ञशीलानामिति न चौर्यादिशब्दवच्छब्दार्थपरिभाषापरः ।

3. For, the property of persons habitually performing sacrifices (explained by us as the import of the term "God's property") is not (the meaning) derived from the primary meaning of the words (composing the term, namely, God and property), like (the meaning of) the term stealing and the like, (but a figurative meaning).

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४। अतोऽन्यथा व्याख्यायते देवानुद्दिश्य यागादिक्रियार्थं धनं यदुत्सृष्टं तद्देवस्वं, मुख्यस्य स्वस्वामिसम्बन्धस्य देवानामसम्भवात्।

4. Hence (the term) is explained in another manner (thus) —property that is set apart or relinquished for the purpose of performance of sacrifices and the like in honour of Gods is (to be taken as intended by the term) "God's property," by reason of the impossibility of the application to Gods, of the primary meaning, namely, the *relation of property and owner*, (a *thing* is *property* in relation to a *person* having proprietary rights over it, and a *person* is *owner* in relation to a *thing* over which he can exercise proprietary rights.

५। न हि देवता इच्छया धनं नियुञ्जते, न च परिपालनव्यापारस्तासां दृश्यते, लोके च तादृशमुच्यते, तस्माद्दृष्टेनैव यदुक्तं—नेदं मम देवताया इदमिति—तद्देवस्वं, तच्च दशपूर्णमासादियागेऽग्न्यादिदेवताभ्यो दीयते श्रिष्टसमाचारप्रसिद्धेर्वं गौणोपायदुर्गोद्धारादिषु।

5. For the Gods do not use the property according to pleasure, nor is found their exertion for the protection (of the property) : and property is described to be of that character in popular view. Accordingly, when by referring or pointing to Gods, it is stated—this is not mine, this is God's—that is God's property—and that property is enjoined (by the Vedas) for the Fire-God and the like in the Dasa-purnamasa sacrifice and the like—(and also enjoined) by the well-known practice of the learned (not by the Vedas, for Gods worshipped) in the Durga sacrifice and the like secondary means (of attaining spiritual benefit, but not primary inasmuch as these are not enjoined by the Vedas).

६। ननु चतुर्भुजादिप्रतिमासम्बन्धि लोके देवस्वमुच्यते, लोकप्रसिद्धश्च शब्दार्थः शास्त्रे ग्रहीतुं न्याय्यः।

6. It cannot be argued that in popular view (property) relating to the Four-armed or the like *image* (of God) is called "God's property," and it is proper to put the popular meaning on words (employed) in the Sastras.

७। स्यादेवं, यदि देवस्वशब्दोनिर्भागः प्रसिद्धिमुपेयात्, देवानां स्वं देवस्वमित्यवयवप्रसिद्धया समुदायार्थः प्रकटः, न च तावतोऽत्रप्रकरणस्थस्य प्रमाणेनाप्यस्ति।

7. It would be so, if the term "God-property" acquired notoriety (in that sense), undivided (into, or without reference to, its component parts—God and property ; but) by reason of

the notoriety of the component parts, namely,—God's property is *God-property*, the meaning of the whole (as consisting of the meanings of the component parts) is preferable. Nor is there any evidence for inferring another passage for the purpose of supporting the proposed meaning.

८। मुख्यं चतुर्भुजादीनां देवत्वं प्रतिमाव्यवहारैरेवापहृतं।

8. The assumption that the Four-armed and the like have the status of God in the primary sense, is removed by the very use of (the term) Image (in para. 6.)

९। न च यदुक्तदेवत्वमस्ति, अथ समाचारतो देवत्वं, भवतु, स्वस्वामिभावस्तावन्नास्ति, यथोक्तेन च प्रकारेण स्वव्यवहारोपपत्तिरिति निष्टंतीये ॥२६॥

9, Nor can it be argued that although there is no God in the primary sense, still let such property be *God's property* by usage. Be it so, but there cannot be the *relation of property and owner*. The use of the term property (as God's) may be reconciled in the manner stated (above by us). This is discussed in the second.

The concluding reference is to the commentary of Medhatithi himself on the Second Book of the Institutes of Manu, where he observes as follows on Verse 189:

एवं देवस्वं देवपशवो देवद्रव्यं—इत्यादयो व्यवहारा—तादर्थ्येन उपकल्पितेषु पशादिषु द्रष्टव्याः। दण्डाधिकारेतु प्रतिकृतिविषयम् एव देवता-व्यवहारं इच्छन्ति, अन्यथा व्यवस्थाभङ्गः स्यात्। कल्पितदेवतारूपाणां प्रतिकृतीनां कल्पितेनैव स्व-स्वामिभावेन यत्-सम्बन्धि 'देवब्राह्मणराज्ञां तु द्रव्यं विज्ञेय मुत्तमम्'इत्यादिषु,—देवद्रव्यम्। नहि देवतानां स्व-स्वामिभावोऽस्ति,—मुख्यार्थासम्भवात् गौणएवार्थः स्याद्ः।"

[Mandalik's Ed. page 267.]

"It should be noticed that such expressions as property of the Gods, animals of the Gods, thing of the Gods, etc., mean animals etc., supposed to be intended for the Gods. In the section on punishment the term (देवता) 'God' is desired to be used in the sense of images only; otherwise, there would be an upsetting of the established order. In such texts as "anything good belonging to the Gods, Brahmans and Kings should be known etc." *i. e.*, a thing belonging to the Gods which is connected with an imaginary ownership of the images or likenesses imagined to be Gods. The Gods have no ownership of their own, and so the primary sense being inadmissidle here, the secondary sense alone should be accepted."

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It is conclusively established from these authorities that according to strict Hindu juridical notions, there can be no gift in favour of the Gods. We are not concerned now with the philosophical reason for this position, and it is needless to inquire whether it is due to the fact that in the earliest times physical objects were deified, and could not, therefore, be very well supposed to be capable of acceptance of a gift, or to the fact that the deity was conceived as a being to whom a mortal could not aspire to make a gift, but could only content himself with a dedication of things for acceptance. Durgacharyya, however, in his commentary on the following passages of the Nirukta seems inclined to adopt the view that as the Gods were originally physical objects deified, they could not very well be regarded as sentient beings capable of acceptance of gifts in the strict sense of the term.

निरुक्त, उत्तरषटक, दैवतकाण्ड, अध्याय ३, पाद २, खण्ड ३। पृ ३६-४३। "अथाकारचिन्तनं देवतानां पुरुषविधाः स्युरितोऽन्यं चेतनावदहिंस्तवो भवन्ति तथाभिधानान्यथापि पौरुषविधिकैरङ्गैः संस्तूयन्ते। "स्तुषा त इन्द्र स्थविरस्य वाहू" (१) "यत्सङ्गृभ्णा मघवन् काशिरित्ते' (२) अथापि पौरुषविधिकैर्द्रव्यसंयोगैः। "आ हाभ्यां हरिभ्यामिन्द्र याहि" (३) "कल्याणीर्जाया सुरणं रणेते।" (४) अथापि पौरुषविधिकैः कर्मभिः। "अङ्गोन्द्र पिव च प्रस्थितस्य"। (५) "आयुतकर्ण शुधी हवम्।" (६)

अपुरुषविधाः स्युरित्यपरमपि तु यद् दृश्यतेऽपुरुषविधं तद् यथाग्निर्द्यौरादित्यः पृथिवी चन्द्रमा इति यथो एतदचेतनावद्हिंसातवो भवन्ति-इत्यचेतनान्यग्नेर्वं स्तूयन्ते यथाच प्रभतीनोषधिपयन्तानि यथो एतत् पौरुषविधिकैरङ्गैः संस्तूयन्त इत्यचेतने स्वप्ने तद्वतामिक्रन्दन्ति हरितेभिरासभिरिति (७) यावत्स्तुतिर्यथो एतत् पौरुषविधिकैर्द्रव्यसंयोगैरितोऽतदपि तादृशमेव, "सुखं रथं ययुजे सिन्धुरश्विन" (८) इति नदीस्तुतिर्यथो एतत् पौरुषविधिकैः कर्मभिरित्येतदपि तादृशमेव, "हीतृषित् पूर्व्यं हविरदामाशतेति" (९) यावत्स्तुतिरेव।

The following version will give a fairly accurate idea of the passage, which deals with the subject of the anthropomorphic and physical conception of the Gods.

(१) ऋग्वेद, ४-७-३१-३
(२) ऋ-३-२-१-४
(३) ऋ-२-६-२१-४
(४) ऋ-१-३-१८-६
(५) ऋ ८-६-२१-८
(६) ऋ १-१-२०-८
(७) ऋ ८-४-२८-२
(८) ऋ ८-३-१-४

[९] ऋ ८-४-२८-२

"One conception of the shapes of the Gods is that (they are) like human beings, inasmuch as the praises (of the Gods) speak of them like conscious beings. So also are their designations. They are praised with man-like limbs, as in Rigveda 4, 7, 31, 3 : "Oh Indra ! Thou art bulky in thy graceful arms." Rigveda 3, 2, 1, 5 : "Oh Maghaban ! as Thou joinest together the two worlds (earth and heaven) large is thy fist." (They are praised also) as possessed of things used by men. Rigveda 2, 6, 21, 4. "Come Indra with a pair of horses" Rigveda 3, 3, 19, 6. "In thy house is an auspicious wife (Sachi)." (They are praised) also with acts of human beings. Rigveda 8, 6, 21, 8. "Eat, Oh Indra, ! and drink of (these), lying before." Rigveda, 1, 1, 20, 9. "Oh Indra ! having ears, hearing all around, listen to our invocation quickly." The other (conception of the shapes of the Gods) is found to be that (the Gods) are not like human beings as the fire, the air, the sun, the earth, the moon. The hymns represent them like conscious beings, and for this reason even unconscious objects are so praised ; such are dice and things like these down to plants that yield only a single harvest. Thus, they are praised as if possessed of limbs like human beings so it is even with unconsious things. Rigveda 8. 4, 29, 2. These stones (used for pressing out *somo* juice with their green mouths are crying after (the Gods). As this is a praise of the stones, so is the following a praise by connecting with things that are used by human beings. Rigveda 8, 3, 7, 4. Sindhu river joined a comfortable chariot furnished with horses. As this is a praise of the river so is the (following) nothing but a praise of stones by attributing actions like those of human beings. Rigveda 8, 4, 29, 2. Let the stones eat clarified butter fit for eating before the invoker of the Gods (Agni)."

The same view is supported by Rigveda 1, 1, 11, 1, and Atharvaveda, Book XX, Hymn 26, 4 and 5. It is not necessary, however, to pursue this line of investigation further. We start with the position that in the case of deities, there cannot be any acceptance and, therefore, neeessarily, any gift. If therefore, a dedication is made in favour of the deity, what is the position ? The owner is divested of his rights. The deity cannot accept. In whom does the property vest ? The answer is that the king is the custodian of all such property. This is sufficiently indicated

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by the following passages. Vijnaneswara in the Mitákshára (Vyavahara Adhyaya verse 186) lays it down that one of the duties of the king is the protection of the Devagriha, and Aparaditya and Mitra Misra in their commentaries on the same subject lay down the rule in the same manner. In the Sukraniti, chapter 4, verse 19, stress is laid upon this as one of the primary duties of kings. The true Hindu conception of dedication for the establishment of the image of the deity and for the maintenance thereof is that the owner divests himself of all rights in the property; the king, as the ultimate protector of the State, undertakes the supervision of all endowments. There is no acceptance on the part of the deity, but from the dedication, religious merit and spiritual benefit accrue to the founder, and material benefit accrues to the persons in charge of the worship and to the creatures of God.

It may further be observed that it is indisputable that the Hindu law encourages dedication of property for religious purposes. It is sufficient to refer to the following passage from Katyayana:

सन्धिनार्त्तेन वा दत्तं श्राद्धितं धर्म्मकारणात्। अदत्त्वा तु मृते दाप्यस्तत्सुतो नात्रसंशयः॥

which is rendered by Mandalik as follows: (page 124 of Edition of Yajnavalkya.)

"If a gift be promised by a person, whether in health or in sickness and for a religious purpose, and he dies without making it, his son should be compelled to make it. Of this there is no doubt."

There can be no question as to the genuineness of this passage, because it is quoted with approval in the Mitákshára, Viramitrodaya, Vyavaharamadhaba, Vyavaharamayukha, Kamalekar's Vivadatandab, Raghunandan's Suddhitattwa, Vivadaratnakara, and in Jagannath's Vivadabhangarnaba translated by Colebrook. The spirit, if not the letter, of this text is entirely inconsistent with the position that a direction given by a Hindu that an image of a deity should be established and that his property should be applied for the maintenance of the worship is inoperative, because the image was not established by himself. Jagannath, in Book II, Chapter IV, section 1, verse 3, touches upon this matter, and points out that the text of Narada relating to the recovery of objects of gifts not duly given (Asiatic

Society's Edition 137) has no application to religious gifts. The conclusion, therefore, is irresistible that the doctrine laid down by the Judicial Committee in the cases of *Tagore* v. *Tagore* (1) and *Bai Mativahu* v. *Bai Mamubai* (2), as to gifts in favour of sentient beings, has no application to directions for the dedication of property for the establishment of images and for the worship thereof.

It has been argued before us that even if it be assumed that the rule about acceptance applies in the case of the deity as in the case of sentient beings, the validity of the testamentary disposition may be upheld, inasmuch as the deity is always existent and it is immaterial whether the image is established or not. The argument in substance is that, to take a concrete example, whether a paticular image of Kali is established or not, the Goddess Kâli is ever existent, and a gift for the purpose of her worship is valid, although at the time of the death of the testator there is no image in existence. In support of this view reliance has been placed upon the following passage quoted by Raghunandan.

चिन्मयस्या द्वितीयस्य निष्कलस्या शरीरिणः । उपासकानां कार्य्यार्थं ब्रह्मणोरूपकल्पना ॥

"It is for the benefit of the worshippers of devotees that there is manifestation in male and female forms of the supreme being, which is bodiless, which has no attribute, which consists of pure spirit, and which is without a second being."

Various passages of the same import are to be found in other authorities, for instance Haratatwadidhiti and Mahanirvantantra (4, 16), the latter of which quotes a passage from Mundamalatantra and gives other texts of similar import from Kularnabatantra and Agastya Sanhita. From this point of view also, the position of the appellant may be undoubtedly supported; but it is not necessary to base my opinion upon this ground; for it is etablished beyond the possibility of dispute that the ordinary conception of a gift is not applicable to the case of dedications to the deity.

Let us now consider the decided cases from the point of view of the principles already explained. The cases of *Upendra Lal* v. *Hem Chundra* (3), *Rojomoyee* v. *Troylukho Mohiney* (4)

(1) (1872) 9 B. L. R. 377.
(2) (1897) I. L. R. 21 Bom. 709, L. R. 24 I. A. 93.
( ) (1897) I.L.R. 25 Calc. 405.
(4) (1901) I.L.R. 29 Calc. 260

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and *Nogendra Nandini* v. *Benoy Krishna Deb* (1) proceeded on the assumption that the rule in the case of *Tagore* v. *Tagore* (2) and *Bai Mativahu* v. *Baimamu Bai* (3) is applicable to cases of dedication of property for the establishment of images of deties and for their worship. The case of *Promotho Nath* v. *Nogendra Bala* (4), rests on the same assumption. The case of *Doorga Proshad* v. *Sheo Proshad* (5) does not directly touch the point, though it appears to have been held that an idol cannot be said to have juridical existence, unless it has been consecrated by proper ceremonies and so has become spiritualised. Nor does the earlier case of *Shib Chunder Mullick* v. *Tripura Sundari* (6) really affect the question now under consideration. The Court proceeded on the ground that it would not require trustees to carry out trusts for religious purposes under the will of a Hindu, unless those purposes were defined. On the other hand, the cases of *Mullick* v. *Mullick* (7), *Gokool Nath* v. *Issur Lochun* (8), *Profulla Chunder* v. *Jogendra Nath* (9) *Bhugobutty Prosonna* v. *Goooro Prosonno* (10) *Ashutosh* v. *Doorga Churn* (11) *Hemangini* v. *Nobin Chand* (12), *Parbati* v. *Ram Barun*, (13) *Jairam* v. *Kuverbai* (14), *Munoher* v. *Lakhmiram* (15) are all based on the contrary assumption that a trust for a religious purpose is not invalid because the image to be established is not in existence at the time of the death of the testator, and I may add that this latter view undoubtedly represents what was regarded as the law from the time of the decision of the Judicial Committee in 1829 down to 1897. These decisions appear to me to be consistent with the true rule of Hindu Law as deducible from the authorities I have already examined. It is, however, I think, possible to show that the view indicated above, not only represents the

(1) (1902) I. L. R. 30 Calc. 521.
(2) (1872) 9 B. L. R. 377.
(3) (1897) I. L. R. 21 Bom. 709, L. R. 24 I. A. 93.
(4) (1908) 8 C. L. J. 489.
(5) (1880) 7 C. L. R. 278.
(6) (1842) Fulton, 98.
(7) (1829). 1 Knapp. 245; 10 E. R. 302.
(8) (1886) I. L. R. 14 Calc. 222.
(9) (1903) I. C. L. J. 605; 9 C. W. N. 528.
(10) (1897) I. L. R. 25 Cal. 112, and on appeal, (1906) 3 C. L. J. 606.
(11) (1879) I. L. R. 5 Cal. 438; L. R. 6 I. A. 182; 5 C. L. R. 236.
(12) (1882) I. L. R. 8 Cal. 788, 11 C. L. R. 370.
(13) (1904) I. L. R. 31 Cal. 895, 8 C. W. N. 653.
(14) (1885) I. L. R. 9 Bom. 491.
(15) (1887) I. L. R. 12 Bom. 267.

true rule of Hindu Law, but is consistent with the rules of English Law in similar matters.

Under the English Law it is well-settled that a gift for the advancement of religion in general terms, as for instance, a gift to be employed "in the service of our Lord and Master" or "for the worship of God" are valid. In support of this proposition reference may be made to the decisions in *In re Darling* (1) and *Attorney-General* v. *Pearson* (2). In the former of these cases reference is made to the decision of Lord Manners in *Powers-court* v. *Powerscourt* (3) the decision in which was followed in *Felan* v. *Russell* (4). In the second case Lord Eldon observed that if lands or money were given in such a way as would be legal notwithstanding the statutes concerning disposition of charitable uses for the purpose of building a church or a house or otherwise for the maintaining and propagating the worship of God and if there were nothing more precise in the case, the Court of Chancery would execute such a trust by making a provision for maintaining and propagating the established religion of the country. This is in agreement with the view previously indicated by the Lord Chancellor in *Mills* v. *Farmer* (5), namely, that it is quite impossible to maintain the proposition that a gift to charity is to be construed as a legacy to an ordinary legatee who must be sufficiently pointed out and described. The case before us in which no question of indefiniteness can possibly arise, consequently occupies a much stronger position.

It is further clear that under the English Law a valid gift may be made to a charity not in *esse* at the time but to come into existence at some uncertain time in the future, provided there is no gift of the property, in the first instance, for the benefit of any private corporation or person or perpetuity in a prior taker. One of the most recent decisions on the subject is that of *Wallis* v. *Solicitor General for New Zealand* (6) which was heard on appeal by the Judicial Committee from New Zealand. In that case certain Maori Chief had in 1848

(1) (1896) 1. Ch. 50.
(2) (1817) 3 Mer. 353 (409).
(3) (1824) 1. Molloy 616.
(4) (1842) 4 Ir. Eq. Rep. 701.
(5) (1815) 19 Ves. 483, (486); 1. Mer. 55; 34 E. R. 595.
(6) (1903) App. Cas. 173.

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given 500 acres of land to the Bishop of New Zealand for a College to be erected thereon for the general purpose of promoting religion. Up to 1898 no college had been erected and it was found that the land had in course of time become an unsuitable site while the accumulation of its rent had amounted to a considerable sum. It was ruled that there was an express gift of land and money for charitable purposes, and that such a gift was not invalidated by the fact that the particular application directed could not immediately take effect or would not of necessity take effect within any defined limit of time and might never take effect at all. It was further held that the doctrine of cypres was applicable. Lord Macnaghten in his judgment relied in support of this proposition upon the decision of Lord Selborne in *Chamberlayne* v. *Brockett* (1). This however is only one of many instances in which the English Courts have affirmed this doctrine and the cases where charitable gifts to non-existent corporations or societies have been sustained are really numerous. The leading case on the subject is that of the Downing College reported under the name of *Attorney-General* v. *Downing* (2) and under the name of *Attorney-General* v. *Bowyer* (3). Other cases in which the same rule has been affirmed are those of *Attorney-General* v. *Bishop of Chester* (4), *Loscombe* v. *Wintringham* (5), *Attorney-General* v. *Craven* (6) *Martin* v. *Mugham*.(7), *Henshaw* v. *Atkinson* (8), *In re Clergy Society*, (9) *In re Maguire* (10) *Sinett* v. *Herbert* (11). The Supreme Court of the United States has on several occasions affirmed the same doctrine after an eleborate review of the English decisions on the subject. *Inglis* v. *Sailors Snug Harbour* (12) *Trustees* v. *State* (13) *Ould* v. *Washington Hospital* (14) *Russell* v. *Allen* (15) *Jones* v. *Habersham* (16). In the third

(1) (1872) L. R. 8 Ch. App. 206.
(2) (1766) 2 Amb. 550, 571 ; Wilmot 1 ; Dick. 414 ; 27 E. R. 353, 368.
(3) (1798) 3 Ves. Jun. 714, 30 E. R. 1235, (1800) 5 Ves. Jun. 300 ; 31 E. R. 598 ; (1803) 8 Ves. 256 ; 32 E. R. 352.
(4) (1785) 1 Brown C. C. 444.
(5) (1850) 13 Beav. 87 ; 51 E. R. 34.
(6) (1856) 21 Beav. 392 ; 52 E. R. 916.
(7) (1844) 14 Sim 230 ; 60 E. R. 346.
(8) (1818) 3 Madd. 306 ; 56 E. R. 577.
(9) (1856) 2 K. & J. 615, 69 E. R. 928.
(10) (1870) L. R. 9 Eq. 632.
(11) (1872) L. R. 7 Ch. App. 232.
(12) (1833) 3 Peters 99 (114).
(13) (1852) 14 Howard 274.
(14) (1877) 95 U. S. 313.
(15) (1882) 107 U. S. 168.
(16) (1882) 107 U. S. 191.

and fourth of these cases many of the decisions in England to which we have referred are minutely examined, and the rule is laid down that a gift for charitable uses is valid even though it is in favour of a non-existent corporation or society. I refer to these English and American decisions, not as authorities in any way binding upon this Court but solely to illustrate the position that the conclusion at which we arrive upon a strict interpretation of the texts of Hindu Law is consonant with the principles which been adopted independently in other systems of Jurisprudence. We cannot overlook the fact that, as pointed out in the case of *Trikumdas* v. *Haridas* (1), their Lordships of the Judicial Committee when called upon to decide an analogous question in *Runchordas* v. *Parbatibai* (2) placed considerable reliance upon the decisions of the English Courts in similar matters, although in that particular instance there is room for doubt whether the actual decision was, in view of the texts to which attention was invited by Sir Subrahmania Ayyar in *Parthasarthy* v. *Thiruvengada* (3) quite in harmony with the true doctrine of Hindu Jurisprudence.

To sum of:

I. The view that no valid dedication of property can be made by a will to a deity the image of which is not in existence at the time of death of the testator, is based upon a double fiction, namely, *first*, that a Hindu deity is for all purposes a juridical person, and *secondly*, that a dedication to the deity has the same characteristics and is subject to the same restrictions as a gift to a human being. The first of these propositions is too broadly stated and the second is inconsistent with the first principles of Hindu Jurisprudence.

II. The Hindu Law recognises dedications for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed *extra commercium* and is entitled to special protection at the hands of the Sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments. [*Manohar* v. *Lakhimram* (4) affirmed in appeal by the Judicial Committee in *Chotalal* v. *Manohor* (5)]. It is

(1) (1907) I. L. R. 31 Bom. 583 ; 9 Bom. L. R. 560.
(2) (1898) I. L. R. 23 Bom. 725, L. R. 26 I. A. 71 ; 3 C. W. N. 621.
(3) (1907 I. L. R. 31 Mad. 340. (4) (1887) I. L. R. 12 Bom. 247.
(5) (1899) I. L. R. 24 Bom 50 ; 4 C. W. N. 23.

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immaterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in the course of the year.

On these grounds I agree with the learned Chief Justice that both the questions referred to the Full Bench ought to be answered in the negative.

COXE, J.—I agree with the learned Chief Justice.

CHATTERJEE, J.—The testator Umes Chandra Lahiri died on the 28th June, 1890, after having mode a will on the 26th of June 1890. Amongst other matters the will provided "All my properties shall be placed in the hands of Baboos so and so as trustees." They were to give certain annuities, to defray the expenses of certain named relatives, to pay Rs. 10 per annum to his Guru Hari Nath Bhattacharjee and Rs. 5 to his Purohit Siris Chandra Chakrabarty, to defray the cost of the worship of the family Thacoors. It also directed that "they shall spend the surplus income which may be left in the *Sheba* and worship of Kail, after establishing the image of the Kali,after the name of my mother *i. e.* in the name of Iswar Anandamoyi Kali." "I further provide that if for any reason, the image of Iswar Kali Debi is not established and if the income of my properties is not used for her *Sheba* and worship, then my Gurudeb and his sons, grandsons &c., in succession, shall get my Rangpur properties and possess the same in absolute right from generation to generation with right to sell &c."

In accordance with the above direction the executors established and consecrated in the month of October or November, 1894, an image of the Goddess made of earth and later on in the year 1894 replaced the same by one made of stone and had a temple built for its location. They thus carried out the direction in the will and the worship has ever since been carried on. On the 4th of July, 1904, the plaintiffs who are the sons of the Guru of the testator brought the present suit for the construction of the will, for a declaration that the trust for the establishment and consecration of the image of the Goddess Kali and her worship was void, for possession of the Rangpore properties and for an account and mesne profits. The Court of first instance held that the bequest in favour of the Goddess Kali

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was valid and dismissed the suit. On appeal by the plaintiffs the Division Bench disagreeing with the case of *Upendra Lal Boral* v. *Hem Chandra Boral* (1) and some later cases which followed the same, referred the following questions for the decision of the Full Bench.

(1) Does the principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void ?

(2) Whether the cases of *Upendra Lal Boral* v. *Hem Chandra Boral* (1) ; *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (2) and *Nogendra Nandini Dassee* v. *Benoy Krishna Deb* (3) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu Deity whose image is to be established and consecrated in future is void ?

The cases mentioned in the order of reference are all more or less based on the decision of the Privy Council in the great *Tagore case* (4). The said case was in respect to a gift to a human being and was based on a passage in tho Dayabhaga, Chapter 1, paragraph 21 which is to the following effect :

२१। अथ व्यापारेणान्यस्य स्वत्वमविरुद्धं शास्त्र मूलत्वादस्य। दृष्टञ्च लोकेपि दानेहि चेतनोहेश्य विशिष्ट त्यागादेव दाह व्यापारात् सम्प्रदानस्य द्रव्ये स्वामित्वं।

"The right of one may cosistently arise from the act of another, for an express passage of law is authority for it : and that is actually seen in the world, since in the case of donation the donee's right to the thing arises from the act of the giver ; namely from his relinquishment in favour of the donee who is a sentient person." Colebrooke's translation.

The next Paras. 22 and 23 go on to say that the title of the donee accrues before the acceptance and paragraph 24 says that the acceptance makes the title which has already accrued capable of full enjoyment, thus differing from the Mitakshara which holds that title does not accrue before acceptance. The author is here incidentally dealing with the

(1) (1897) I. L. R. 25 Calc. 405
(2) (1901) I. L. R. 29 Calc. 260.
(3) (1902) I. L. R. 30 Calc. 521.
(4) (1872) 9 B. L. R. 377, 18 W. R. 359.

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meaning of the word gift and does not make any further reference to the subject. Of the commentators on the Dayabhaga, Sreenath says चेतन पदं चेतन विशेष परं अतो न यागे गवादि पूजाया अति प्रसक्ति :

"The word sentient is spoken of, of some particular sentient being and the definition of gift is not wide enough to include *jaga* (or gift in favour of a deity) or the worship of a cow &c. (to which things are given). Achyutananda says त्यागमात्रं वृषोत् सर्गा दावति प्रसङ्गमत आह चेतनेति। Simple त्याग or relinquishment would be wide enough to include the dedication of the sacred bull &c. and therefore the word sentient is used. Srikrishna Tarkalankar also says त्यागमात्रात् वृषोत्सर्गादिरूपात् स्वामित्वाजननादाह चेतनेति—as in the dedication of the sacred bull no title to the same accrues to any one, the word *tyaga* or relinquishment is spoken of in reference to a sentient being.

All these commentators therefore understand the definition as limited to secular gifts as contradistinguished from gifts of the nature of *jaga* which is a technical word meaning देवतोद्देशेन द्रव्यत्याग: or relinquishment of property intended for a deity or other religious dedication such as that of the sacred bull at a *Sradh*. The subject of Dana or gift however is dealt with in some detail by Narada in the chapter on the subtraction of gifts, and in making a sub-division he says : "In civil affairs the law of gift is fourfold ; (1) what may be given, (2) what may not be given, (3) what is given or a valid gift, (4) what is not given or invalid gifts. Colebrooke's Dig. Vol. 9, page 401 : in commenting on the above Jagannath Tarakpanchanan says :—"the rule to be established that gifts made by a man afflicted with disease and the like are void, regards civil gifts, not donations for a religious purpose. This title of law does not extend to a gift made for a religious purpose : the donation is valid if it be made by the owner of the thing." Jagannath then quotes the text of (कात्यायन) Katyayana :

मुख्येनार्त्तेन यद्दत्तं त्राकिं धर्म्म कारणात् अदत्त्वातु मृते दद्यिस्तत्सुतोनाव संशय: ॥

"What a man has promised in health or in sickness for a religious purpose must be given : and if he die without giving it, his son shall doubtless be compelled to deliver it."

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The same text is quoted with approval by the Vivada Ratnakar; see page 136, Bibliotheca Indica series, where the author in commenting upon another text of Katyayana as to invalid gifts says आर्त्तेन दत्तं धर्म्म कार्य्यमतरेन *i. e.*, "gift by a person affected with disease (being invalid) must apply to gifts other than those made for a religious purpose." Raghunandan in his शुद्धितत्त्व (Shudhitatwa) quotes the same text of Katyayana and says "एवञ्च मुमुर्षु दत्तस्य यद्दानोपसर्गत्वाभिधानं तदधर्म्येतर दानपरं" in the same way the inclusion of a gift by a dying person among invalid gifts has reference to gifts made for other than religious purposes. See also Vyavastha Darpan, 3rd Edition—Vyavastha 713 page 623 and the authorities quoted.

It appears that the word दान or gift when spoken of in respect of the deity is used in a गौण or भाक्त secondary or figurative sense. The Sradhabibeka of Soolapani says आदित्यादि देवता सम्बदानक दानेतु दान शब्दो गौणः तद्धन दक्षिणा दानादाति देशार्थः। The use of the word दान or gift in respect of a gift to the sun and other gods, is secondary or figurative and intended to signify by analogy the giving of the fee in either case. Srikrishna Tarkalankar the great commentator of the Dayabhaga in his commentary on the above passage says तथा चात्र स्वस्वामि भावरूप सम्बन्ध बाधात् मुख्य प्रयोगेन भवत्येव &c. "Here also the use of the word in its primary sense is impossible as there is no sense of one's own ownership" (like that of the donee in a secular gift).

Medhatithi, the great commentator of Menu, in commenting upon the word *Devaswam* (God-property) in Menu Chapter XI Sec. 25, says देवानुद्दिश्य यागादि क्रियार्थं धनं यदुत्सृष्टं तद्देवस्वं मुख्यस्वस्वामि सम्बन्धस्य देवानामसम्भवात् नहि देवता इच्छया धनं नियुङ्क्ते नच परिपालन व्यापारस्था सांदृश्यते। "Property that is relinquished in favour of Gods for sacrifices in their honour is called God-property, by reason of the impossibility of the application to (Gods of the ordinary) relation of owner and thing owned. For the Gods do not use the property according to their pleasure nor do we see them exerting for the protection of the same":

Again ननु चतुर्भुजादि प्रतिमा सम्बन्धि लोके देवस्व मुच्यते, लोक प्रसिद्धश्च शब्दार्थः शास्त्रे ग्रहीतु न्यायः सादेवंयदि देवस्व शब्दो निर्भागः प्रसिद्धिमुपेयात्, देवानां स्वं देवस्वमित्यवयव प्रसिद्धासमुदायार्थः प्रतीतः नच वाक्यान्तर प्रमानेनापाप्ति। मुख्यं चतुर्भुजादीनां देवल प्रतिमा व्यवहारे नेवापद्यतः। नच यद्युक्त लक्षण सन्ति अथ समाचार तो

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देवस्वं भवतु स्व स्वामि भाव लाघवात्। यथा सौम्य च प्रकारेण स्व व्यवहारोपपत्तिरिति श्रिष्टं हितीयं"।

"It cannot be argued that in popular view (property relating to the four-armed or the like *image* of God) is called "God-property" and it is proper to put the popular meaning on words occurring in the Shastras. It would be so if the term God-property acquired notoriety (in that sense) as a single undivided word: but by reason of the notorious meaning of the component parts of the word namely God and property, the meaning of the whole, that is, God's property is God-property, is preferable. Nor is there any evidence for inferring another passage for the purpose of supporting the proposed meaning. The assumption that the four-armed and the like have the status of God in the primary sense is removed by the very use of the term *image*. Nor can it be argued that although there is no God in the primary sense in such cases, still let such property be God-property by usage. Be it so, but there cannot be the relation of owner and thing owned. The use of the term property (as God's) may be reconciled in the manner stated. This is discussed in the second chapter of the Mimansa of Jaimini." Kulluka Bhatta in his commentary on the same word says प्रतिमादि देवतार्थं सृष्टं धनं देवस्वं "the property dedicated for the *images* and other deities is called *Devaswam*." It would appear sufficiently clear from the above authorities that the definition of gift referred to by the Dayabhaga, chapter 1, section 21 is a secular gift and not a gift for a religious purpose. This disposes of the applicability of the *Tagore case* (1) and also the case of *Bai Mativaku* v. *Bai Mamubai* (2), which latter case may be further distinguished as being governed by the Mitákshára Law.

Even if we were to apply the definition as given in the above text of the Dayabhaga to such a gift it would seem absurd to say that a deity is not a setient being. If the deity exists and it manifests itself in the *image* upon the invocation of the worshipper with certain *mantras* it cannot be said to be an insentient being. If it answers to the इहागच्छ इहतिष्ठ

(1) (1872) 9 B. L. R. 372.
(2) (1897) I. L. R. 21 Bom. 709; L. R. 24 I. A. 93.

"come here', "stay here" of the votary it cannot be said to be insentient. The text

चिन्मय स्या दितीयस्य
निष्कल स्या शरीरिण:
उपासकानां कार्य्यार्थं
ब्रह्मणोरूप कल्पना ।

रघुनन्दन प्रतिष्ठातत्त्व ।

"For the use or benefit of the votary Brahman or God although only existing in spirit and without a second, having no attribute and no body, assumes forms."

Sastri's Hindu Law page 420 shews the Hindu idea of the forms attributed to God for the convenience of worhsips; a particular image may be insentient until consecrated but the deity is not. If the image is broken or lost, another may be substituted in its place and when so substituted it is not a new personality but the same deity, and properties previously vested in the lost or mutilated Thacoor become vested in the substituted Thacoor. A Hindu does not worship the "idol" or the material body made of clay or gold or other substance, as a mere glance at the *mantras* and prayers will shew. They worship the eternal spirit of the deity or certain attributes of the same in a suggestive from which is used for the convenience of contemplation as a mere symbol or emblem. It is the incantation of the *mantras* peculiar to a particular deity that causes the manifestation or presence of the deity, or according to some, the gratification of the deity. According to either view, it is the relinquishment of property in the name of the deity for securing its gratification that completes the gift and such relinquishments are valid according to Hindu Law, even if made by a dying man. It may be true that the illiterate Hindu thinks of the consecrated symbol as the deity and has not any clear idea of the particular attribute of the God-head that is worshipped in a particular form, but it cannot be said with any approach to truth that the great *Rishis* and their commentators who declared the Hindu Law had such a gross idea of the divinity they worshipped. In this view of the case also, the text of the Dayabhaga relied on in the *Tagore case* cannot invalidate the

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gift in favour of a deity whose image is consecrated after the death of the donor.

Then again their Lordships of the Judicial Committee in the *Tagore case*, say that the object of the donation must be in existence at least in contemplation of law and as an instance the case of an adopted son is mentioned as by a fiction of law he is supposed to have been conceived during the life-time of the adoptive father. It is contended that Anandamoyi Kali was not in existence during the life-time of the testator although the Goddess Kali was, is, and always will be in existence. Suppose a Hindu gives permission to his wife to adopt a son after his death and to name him by a particular name Ram or Syam or Gopal. It cannot be contended with any semblance of reason that a son adopted by the widow and named as directed by the adoptive father would not be validly adopted because a son of that particular name could not be supposed to have been conceived by relation back to the lifetime of the father. It is not necessary to apply the same analogy in the case of a deity as the reasons herein before enumerated will show, but if it were necessary there would be no difficulty to the Hindu lawyer to call it in aid in favour of the gift.

I have stated above that in the case of a gift to a God, the relation of an onwer to the thing owned in its primary sense is considered to be wanting ; who then is the owner of the property ? In a secondary sense no doubt the deity is the owner but the Sastras lay down.

देवे देयानि दानानि
देवे देयानि दक्षिणा
तत्सर्वं: ब्राह्मणे ददादनाथा निष्फल: भवेत् ।

"Gifts are to be given to the deity and the fee for the acceptance of the gift also is to be given to the deity, but all these are to be (ultimately) given to a Brahman, otherwise the gift would be useless."

Matsya Sooktam quoted by Raghunandan in his Soodhitatwa.

Every gift therefore in favour of a deity is a gift for the ultimate benefit of a Brahman or Brahmans and may therefore

be looked upon as a charitable gift. It was held by Sir Raymond West in the case of *Monohar Ganesh Tamlukar* v. *Lakhmiram Gobindram* (1) that a trust for a Hindu God and temple was created for public charitable purposes. The God and temple in that case was a public one and the trust was therefore considered to be a public one. There is no reason why the gift in this case which is expressly vested in trustees for the purpose of building a private temple and setting up a private deity should not be considered a private charitable trust—charitable, I say, because the ultimate benefit must come to the *pujaris* and *sebaks*. "It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must, in the nature of things, be entrusted to some person as *shebait* or manager" *Prosanno Kumari Debya* v. *Golab Chand* (2). And this carries with it the right to bring whatever suits are necessary for the protection of the property; every such right of suit is vested in the *shebait*, not in the idol, *Maharaja Jogadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Devi* (3). Again bequests for the performance of the periodical *puja* of Durga, Kali &c. or for the celebration of the periodical festivals called *Dole-jatra*, *Rasjatras* &c. have been from very old times given effect to by our Courts. Instances will be found in the following cases, *Ramtonoo Mullick v. Ram Gopal Mullick* (4), *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (5), *Hemangini Dasi* v. *Nobin Chandra Ghose* (6), *Gokool Nath Guha* v. *Issur Lochan Roy* (7), *Bhuggobutty Prosonna Sen* v. *Gooroo Prosanna Sen* (8), *Bisseswar Prosanna Sen* v. *Bhagabati Prossanna Sen* (9), *Profulla Chandra Mullick* v. *Jogendra Nath Sreemany* (10), *Jairam Narrouji* v. *Kuverbai* (11) and *Manohar* v. *Lakhmiram* (1). If a gift in favour of a deity whose image has to be prepared and destroyed priodically is valid, I do not see any reason why a gift in favour of a deity whose image is to be prepared once for all, except for any reason for reconstruction coming to pass, should be invalid.

(1) (1887) I. L. R. 11 Bom. 241 (263).
(2) (1875) L. R. 2 I. A. 145 (152).
(3) (1904) L. R. 31 I. A. 203 (210).
(4) (1829) 1 Knapp, 245.
(5) (1879) I. L. R. 5 Cal. 438.
(6) (1882) I. L. R. 8 Cal. 788.
(7) (1886) I. L. R. 14 Cal. 222.
(8) (1897) I. L. R. 25 Cal. 112.
(9) (1906) 3 C. L. J. 606.
(10) (1905) 1 C. L. J. 605, 9 C. W. N. 528.
(11) (1885) I. L. R. 9 Bom. 431.

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In the present case again the testator does not expressly make a gift to Kali or Anandamoyi Kali. He only vests his properties in certain trustees who are to employ the surplus income of his properties in a certain way by spending the sum in the establishment, *sheba* and Pooja of the Godess Kali under the name and style of Iswar Anandamoyi Kali. I do not see how the rules of gift to a deity, even if they were not as I have stated above, can invalidate the bequest in this case. For the reasons stated above I would answer both the questions referred in the negative.

Per curium—The order of the Court accordingly is that the case be returned to the Division Bench to decide the matter in accordance with the opinion we have expressed.

A. T. M.

THE END.